TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1903.

No. [illegible] 75.

PACIFIC ELECTRIC RAILWAY COMPANY, APPELLANT,

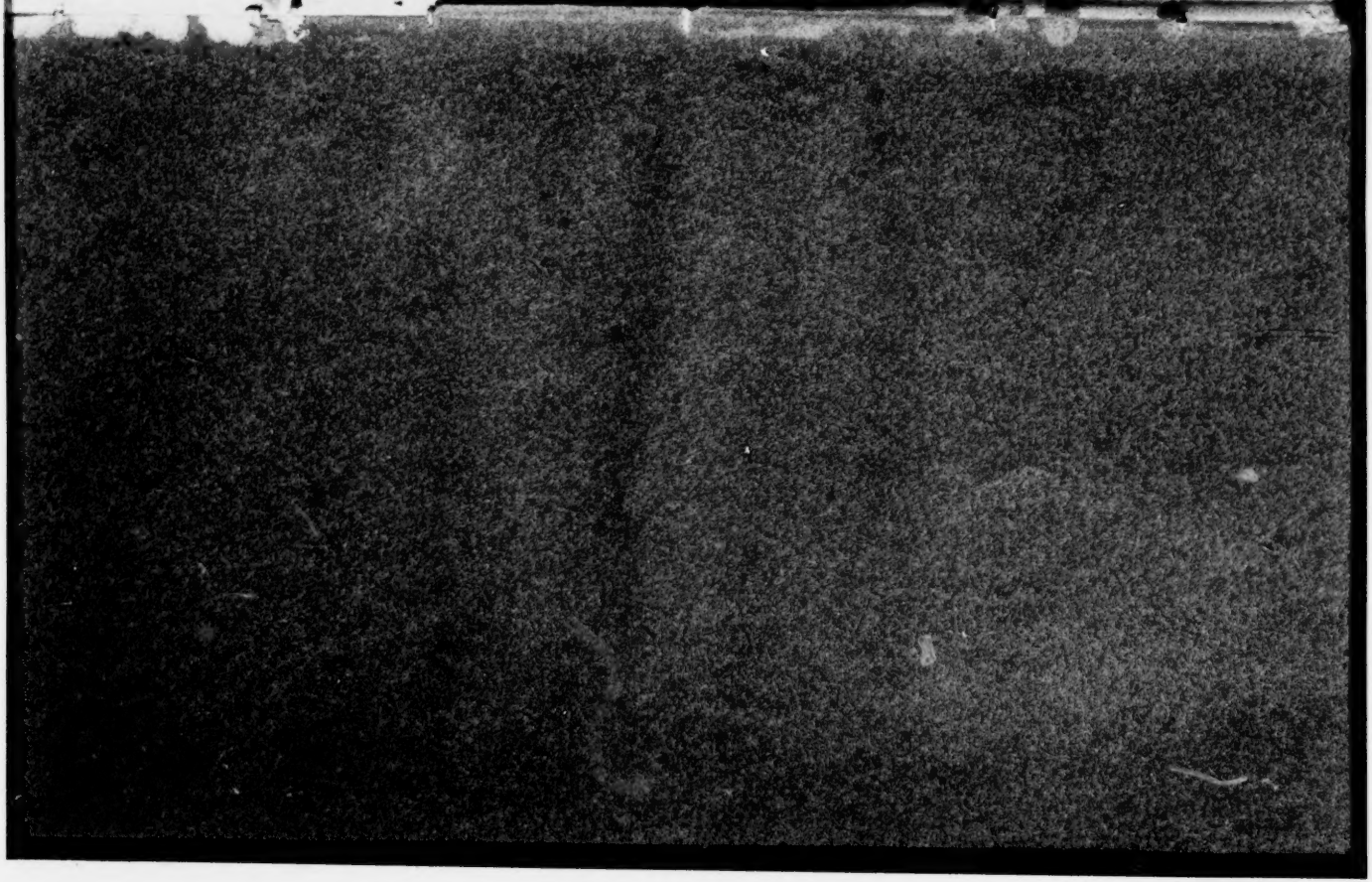
vs.

THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PERCE, ET AL., &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED DECEMBER 24, 1903.

(13,760.)



(18,760.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 532.

PACIFIC ELECTRIC RAILWAY COMPANY, APPELLANT,

vs.

THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, ET AL., &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print
Caption	1	1
Enrolled papers	2	1
Bill of complaint	2	1
Subpœna	41	26
Marshal's returns	42	27
Demurrer of defendants City of Los Angeles *et al*	47	30
Demurrer of defendants Los Angeles Traction Company *et al*	50	32
Order denying motion for injunction, sustaining demurrers to the bill of complaint, and dismissing bill of complaint	53	34
Record of enrollment	55	35
Final decree	57	36
Certificate to enrolled papers	59	36
Opinion of the court on motion for injunction and demurrer to bill	60	37
Appeal and allowance	79	48
Assignment of errors	81	49
Order allowing appeal and approving bond	84	51
Bond on appeal	86	51
Certificate of clerk to transcript	88	53

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 26, 1902.

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants. } No. 1018.

2 In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, GEORGE P. McLAIN, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants.

To the honorable the judge of the United States circuit court in and for the north circuit, southern district of California:

The Pacific Electric Railway Company, a corporation organized under and in pursuance of the laws of the State of California, and having its principal place of business in the city of Los Angeles, county of Los Angeles, in the said State of California, brings this, its bill of complaint, against the said City of Los Angeles, a municipal corporation, organized under the laws of the State of California, M. P. Snyder, the mayor of the said city of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles, The Los Angeles Traction Company, a corporation organized under the laws of the State of Illinois, Wm. S. Hook, and E. A. Davis; and thereupon your orator complains and says:

3 I.

That your orator, The Pacific Electric Railway Company, is and at all the times *times* hereinafter mentioned has been a corporation duly organized under the laws of the State of California, and has its principal place of business in the city of Los Angeles, and is a citizen of said State and resident of the said State in the southern district of California.

II.

That the city of Los Angeles is and for more than fifty years last past has been a municipal corporation, organized under the laws of the State of California, and is a citizen of said State of California and a resident of the southern district thereof.

III.

That the city of Los Angeles is, under the provisions of the charter of the said city, divided into nine wards, and the council of the said city consists of one councilman from each ward; and the said defendants, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd and E. L. Blanchard, are now and during all the times hereinafter mentioned were members of and composed the said council of the city of Los Angeles.

IV.

That M. P. Snyder is and at all the times hereinafter mentioned has been the duly elected, qualified and acting mayor of the city of Los Angeles.

V.

That the defendant, The Los Angeles Traction Company, is a corporation duly organized under the laws of the State of Illinois, and is a citizen of said State.

4 VI.

That the said defendant, E. A. Davis, is a citizen of the said State of California, and a resident of the southern district thereof.

VII.

Your orator further alleges that the legislature of the State of California did, at its session held in the year 1901, pass an act entitled, "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," which said act became a law of the said State of California on the 11th day of March, 1901.

VIII.

Your orator further alleges that the following is a copy of the said act of March 11, 1901:

"SECTION 1. Every franchise or privilege to erect or lay telegraph "or telephone wires, to construct or operate street railroads upon "any public street or highway, to lay gas pipes for the purpose of "carrying gas for heat and power, to erect poles or wires for trans- "mitting electric heat and power along or upon any public street or "highway, or to exercise any other privilege whatever hereafter "proposed to be granted by boards of supervisors, boards of trus- "tees, or common councils, or other governing or legislative bodies

"of any city and county, city or town, within this State, except "steam railroads and except telegraph or telephone lines doing an "interstate business, and renewals of franchises for piers, chutes or "wharves, shall be granted upon the conditions in this act provided, "and not otherwise.

"SEC. 2. An applicant for any franchise or privilege above men-
"tioned shall file with the governing or legislative body of
5 "the municipality an application, and thereupon said gov-
"erning body shall, in its discretion, and when the application "is accompanied with a petition praying that the same be granted, "signed by the owners of three-fourths of the frontage of the real "property fronting along and upon the route of the franchise ap- "plied for, must advertise the fact of said application, together with "a statement that it is proposed to grant the same, in one or more "newspapers of the city and county, city or town wherein the said "franchise or privilege is to be exercised. Said advertisement must "state that bids will be received for such franchise, and that it "will be awarded to the highest bidder, and the same must be pub- "lished in such newspaper once a day for ten successive days, if it "be a daily newspaper, and if there be no daily paper published in "such city and county, city or town, then it shall be published in a "weekly newspaper once a week for four successive weeks, and in "either case the full publication must be completed not less than "twenty (20) nor more than thirty (30) days before any further "action can be taken thereon.

"SEC. 3. The publication must state the character of the franchise "or privilege proposed to be granted, the term for which it is "granted, and, if it be a street railroad, the route to be traversed; "that sealed bids therefor will be received up to a certain hour and "day named therein, and that the successful bidder and his assigns "must, during the life of said franchise, pay to the municipality "two per cent. (2%) of the gross annual receipts of the person, "partnership or corporation to whom the franchise is awarded, "arising from its use, operation or possession. No percentage shall "be paid for the first five (5) years succeeding the date of the fran- "chise, but thereafter such percentage shall be payable annually; "and in the event said payment is not made, said franchise shall "be forfeited; *provided further*, that if the franchise be a renewal of "a right already in existence, the payment of said percentage of
"gross receipts shall begin at once.

6 "SEC. 4. In case the franchise granted shall be an exten-
"sion of an existing system of street railroads then the gross "receipts shall be estimated to be one-half of the proportion of the "total gross receipts of said system which the mileage of such ex- "tension bears to the total mileage of the whole system, and said "estimate shall be conclusive as to the amount of the gross receipts "of said extension.

"SEC. 5. Said advertisement shall also contain a statement that "the said franchise will be granted to the person, firm or corpora- "tion who shall make the highest cash bid therefor; *provided only*, "that at the time of the opening of said bids any responsible firm or

"corporation present, or represented, may bid for said franchise or "privilege a sum not less than ten per cent. above the highest sealed "bid therefor, and said bid, so made, may be raised ten per cent. by "any other responsible bidder present, and said franchise or privi- "lege shall finally be struck off, sold and granted by said governing "body to the highest bidder therefor, in gold coin of the United "States, and said successful bidder shall be required to deposit with "said governing body, or such person as it may direct, the full "amount of his or its said bid, within twenty-four hours thereafter; "and in case he or it shall fail so to do, then the said franchise or "privilege shall be granted to the next bidder therefor.

"SEC. 6. Work to erect or lay telegraph or telephone wires, to con- "struct street railroads, to lay gas pipes for the purpose of carrying "gas for heat and power, to erect poles or wires for transmitting "electric heat or power, along or upon any public street or highway, "or to exercise any privilege whatever, a franchise for which shall "have been granted in accordance with the terms of this act, shall "be commenced in good faith within not more than four months "from the granting of any such franchise, and if not so commenced
"within said time said franchise so granted shall be declared
7 "forfeited, and shall be completed within not more than three
"years thereafter, and if not so completed within said time "said franchise so granted shall be forfeited; *provided*, that for good "cause shown the governing or legislative body may by resolution "extend the time for completion thereof, not exceeding three "months.

"SEC. 7. The grantee of every franchise or privilege granted "under this act shall file a bond running to said city and county, "city or town, with at least two good and sufficient sureties to be "approved by such governing body, in a penal sum by it to be pre- "scribed and set forth in the advertisement for bids, conditioned "that such bidder shall well and truly observe, fulfill, and perform "each and every term and condition of such franchise, and that in "case of any breach of condition of such bond, the whole amount of "the penal sum therein named shall be taken and deemed to be "liquidated damages, and shall be recoverable from the principal "and sureties upon said bond. Said bond shall be filed with such "governing body within five days after such franchise is awarded, "and in case said bond shall not be so filed, the award of such "franchise shall be set aside, and the same may be granted to the next "lowest bidder, or again offered for sale, in the discretion of said "governing body.

"SEC. 8. It shall be the duty of the attorney general, upon the "complaint of any municipality, or, in his discretion, upon the com- "plaint of any tax-payer, to sue for the forfeiture of any franchise "granted under the terms of this act, for the non-compliance with "any condition thereof.

"SEC. 9. No clause or condition of any kind shall be inserted in any "franchise or grant offered or sold under the terms of this act, "which shall directly or indirectly restrict free and open competi- "tion in bidding therefor, and no clause or provision shall be in-

"serted in any franchise offered for sale, which shall in any-
8 "wise favor one person, firm or corporation, as against an-
"other, in bidding for the purchase thereof.

"SEC. 10. Any member of any common council or other gov-
"erning or legislative body of any city and county, city or
"town of this State, who, by his vote, violates or attempts to violate
"the provisions of this act, or any of them, shall be guilty of a mis-
"demeanor, and may be punished therefor, as provided by law, and
"may be deprived of his office by the decree of a court of competent
"jurisdiction, after trial and conviction.

"SEC. 11. All acts or parts of acts in conflict herewith are hereby
"repealed; *provided, however*, that nothing herein contained shall be
"construed as repealing or amending the following acts, to wit: 'An
"act relating to the granting by the counties and municipalities of
"franchise for the construction of paths and roads for the use of
"bicycles and other horseless vehicles,' approved March twenty-
"seventh, eighteen hundred and ninety-seven; 'An act to authorize
"cities and towns to grant franchises for the construction and main-
"tenance of railroads beyond the limits of such cities or towns lead-
"ing to public parks owned thereby,' being chapter forty of the laws
"of eighteen hundred and ninety-seven of the State of California.

"This act shall take effect immediately."

IX.

Your orator further alleges that the city council of the city of Los Angeles is the governing and legislative body of said city.

X.

Your orator further alleges that under and in pursuance of the provisions of the said act, your orator did on the 25th day of November, 1901, present to the said governing body, to wit, the said council of the city of Los Angeles, an application for an electric street railway franchise, to be constructed and operated upon
9 certain public streets of this city, and hereinafter more particularly specified, and did file the said application for such franchise with the said governing body of the said municipality; and the said application so presented by your orator to the said council of the city of Los Angeles, was by said council referred to the board of public works of said city, and on the 9th day of December, 1901, the said board of public works made their report to the said council of the city of Los Angeles, stating that they had heard the protests and objections thereupon, and recommended that the said franchise be offered for sale, as hereinafter more specifically alleged, and that the city attorney should be instructed to present a notice of sale of the said franchise; and the said report of the said board of public works was considered by the council, and was by the said council duly adopted, and the said council did thereupon exercise its discretion as in the said act provided, and did determine that the said franchise should be sold. And in pursuance of the said order, a notice of sale of the said electric street railway franchise was submitted to the city council of the city of Los Angeles

on the 6th day of January, 1902; and the said council of said city did on the said day approve and adopt the said notice, and directed and instructed the city clerk to publish the same, as provided in the said act.

XI.

Your orator further alleges that in pursuance of the said instructions, the said city clerk did publish the said notice in the Los Angeles Daily Journal, a newspaper published daily in the city of Los Angeles, in the county of Los Angeles, and State of California, and said notice was published in such newspaper once a day for more than ten successive days.

XII.

Your orator further alleges that the said notice of sale of the said street railway franchise, in which is fully described the said
10 franchise so to be granted, and all the rights and privileges granted therewith, and of the streets over and upon which the said electric street railway was to be constructed and operated, and published as aforesaid, was as follows:

"*Notice of Sale of a Street Railroad Franchise.*

"Office of the city clerk of the city of Los Angeles.

"Los Angeles, Cal., *Jan. 6th*, 1902.

"To whom it may concern:

"Notice is hereby given that an application has been made to the "city council of the city of Los Angeles for a certain franchise, "granting the right to construct and for the period of forty years to "operate and maintain an electric street railroad upon certain public "streets in said city, hereinafter described, together with certain "appurtenant and incident rights hereinafter mentioned.

"And that it is proposed by said city council to offer for sale and "grant to the highest bidder said franchise, upon the terms and "conditions hereinafter mentioned.

"That said franchise is described as follows, to wit:

"A franchise to construct and for the period of forty years to "operate and maintain a double-track electric street railroad over "the route and in and upon the streets or portions of streets in said "city described as follows, to wit:

"Commencing at the intersection of Spring street and Seventh "street; thence northerly on Spring street to Fourth street; "thence westerly on Fourth street to Broadway; thence southerly "on Broadway to Seventh street; thence easterly on Seventh "street to Santa Fe avenue; thence northerly on Santa Fe "avenue to Willow street; thence westerly on Willow street to
"Mateo street; thence northerly on Mateo street to Palmetto
11 "street; thence northerly over private right of way to the "intersection of Fourth street and Santa Fe avenue; thence "northerly on Santa Fe avenue to Third street.

"Also commencing at the intersection of Seventh street and "Ceres avenue; thence northerly on Ceres avenue to its intersection "with Central avenue; thence northerly on Central avenue to Fifth "street; thence easterly on Fifth street to its intersection with the "property of the Southern Pacific Railroad Company.

"Also commencing at the intersection of Seventh street and San "Pedro street; thence northerly on San Pedro street to First street; "thence westerly on First to Broadway.

"Also commencing at the intersection of Main and First streets; "thence northerly on Main street to its intersection with Spring "street.

"Also commencing at the intersection of Seventh street and Los "Angeles street; thence southerly on Los Angeles street to Wash-"ington street; thence easterly on Washington street to Compton "avenue; thence southerly on Compton avenue to Twenty-third "street; thence southerly on Compton avenue to Thirty-eighth street; "thence easterly on Thirty-eighth street to Compton avenue (or over "private right of way from Compton avenue at Twenty-third street "to Compton avenue at its intersection with Thirty-eighth street); "thence southerly on Compton avenue to the south limits of the city "of Los Angeles.

"Also commencing at the intersection of Seventh street and "Central avenue; thence southerly on Central avenue to Eighth "street; thence easterly on Eighth street to Tennessee street; thence "southerly on Tennessee street to Little Rock avenue; thence south-"erly on Tennessee street to Sixteenth street; thence easterly on "Sixteenth street to Compton avenue (or over private right of way "from Tennessee street at Little Rock avenue to the intersection of "Compton avenue and Sixteenth street); thence southerly on Comp-
"ton avenue to Washington street.

12 "Also commencing at the intersection of Seventh street and
"Santa Fe avenue; thence southerly on Santa Fe avenue to "Ninth street; thence easterly on Ninth street to Hostetter street; "thence easterly on Park avenue to Rosalind street.

"Together with the right to construct and maintain all necessary "switches, turnouts, curves, connections at street intersections, power-"houses, and all other appliances, properties, constructions and at-"tachments that may be necessary for the purpose of operating said "road and enabling it to be as effective as the best electric street "railroads.

"That the terms and conditions upon which the said franchise "will be offered for sale and granted are the following, to wit:

"First. That the street railroad constructed and operated under said "franchise shall be used only for the transportation of passengers "and United States mail and for the transportation subject to the "conditions and restrictions hereinafter mentioned, of baggage "and such packages and commodities as can be conveniently "handled and carried in enclosed cars of the character hereinafter "described.

"That in all cases where said franchise is granted over streets "now occupied by other lines of street railways, the grantee thereof

"and his or its successors and assigns shall have the right to operate "over any and all the tracks of such other lines, subject to the pro- "visions and limitations of the statutes of the State of California "applicable thereto; and in case the gauge of the tracks of said "other lines of street railways shall not conform to the gauge of the "tracks of said grantee, his or its successors or assigns, said grantee "or his or its successors or assigns shall be permitted to lay a third "rail over the distance traversed by said two roads jointly.

"Second. That the tracks to be laid under said franchise shall be
"placed as nearly equidistant from the center of the street as
13 "possible, and as near each other as a proper regard for safety
"will allow.

"Third. That said grantee and his or its successors and assigns "shall use in the construction of said road the best material includ- "ing a rail weighing not less than sixty (60) pounds per yard, such "as is used on first-class street railroads, which rail shall be satis- "factory to the street superintendent and the board of public works; "and said rails shall be so laid as to be continuously welded or "otherwise securely fastened together; and the said grantee and his "or its successors or assigns shall at his or its or their own expense "and cost pave and macadamize the said road between the rails, "between the tracks, and for two (2) feet on each side thereof, with "the same material used by the city and under the same specifica- "tions and in the same manner as upon the streets over which said "road runs respectively; and shall keep the same constantly so "paved or macadamized and in repair, flush with the street, and "provided with suitable crossings, and shall make the road-bed con- "form at all times to the established grade of the street, provided "however, that where any of the above-named streets have been "graded or otherwise improved prior to the granting of said franchise, "said road-bed and rails shall conform to and be flush with the surface "of said graded or otherwise improved street or streets, whether "such surface be above or below the official grade of such street or "streets; and on all other street or streets said road-bed and rails "shall conform to such official grade as aforesaid. And provided "further, that upon any regrading or other improving of said street "or streets, said road-bed and rails shall, by said grantee or his or "its successors or assigns, be placed upon and be made to conform to "said official grade, all repairs and grades to be made under the "instructions and to the satisfaction of the street superintendent of
"said city. In case the said grantee or his or its successors
14 "or assigns fails to comply with the instructions given by
"said official for ten (10) days after service thereof upon the "said grantee or his or its assigns, or upon the manager or agent of "said grantee or his or its successor or assign in Los Angeles, he, "the said official, shall enter upon the road of said grantee or his or "its successors or assigns, and do the work as ordered by the city "council of the city of Los Angeles, said officer to keep an itemized "account of the cost of said work, which the said grantee and his or "its successors or assigns, by the acceptance of said franchise, agree "to pay immediately upon its being presented to said grantee or

"his or its successor or assign or to such manager or agent stationed "in Los Angeles.

"Provided further, that cars shall be run over the road constructed "under said franchise during every day unless prevented by ele- "ments, riots, strikes, or unavoidable causes.

"Provided also, that cars shall be run each way over and upon said "road at intervals of not more than fifteen (15) minutes during the "daytime and until eleven (11) o'clock at night of each day, and as "much oftener as may be necessary to carry and provide with seats "all persons who may apply for transportation over said road, ex- "cept in times of extraordinary and unfor-seen amount of travel. "That said cars shall be in all respects at all times, as efficiently "constructed and conveniently equipped as the cars in use upon the "best electric street railways in the city of Los Angeles.

"That no cars shall be used on said road, or on any part thereof, "for the carriage of baggage, packages or commodities, except en- "closed cars of neat and attractive design and construction, and not "exceeding in length or width the cars used for carrying passen- "gers only.

"And provided, further, that no such cars used for the carriage "of baggage, packages or commodities shall ever be run or operated "over any part of said route hereinbefore described which 15 "runs along any part of Broadway, Main or Spring streets in "said city.

"Provided further, that said grantee and his or its successors or "assigns, shall construct all necessary flumes and culverts for the "free passage of water under the tracks of said railroad wherever and "whenever necessary, and that all such flumes, and culverts, and all "curves, acqueducts, turnouts and switches shall be constructed in "accordance with plans and specifications approved by the city "engineer.

"Provided further, that said grantee and his or its successors and "assigns shall have the right to excavate and remove portions of the "streets necessary to properly construct said road, and to erect need- "ful apparatus, boilers, engines and other appliances, to properly "equip and run said road.

"Provided further, that the city of Los Angeles in granting said "franchise expressly reserves the right to pave, macadamize, renew "or sewer any of the said streets, or to lay gas, water or other pipes "therein, said work to be done so as to injure said road as little as "possible.

"Provided further, that the cars upon said road shall not be "allowed to stand on any street or on any street intersection in such "a manner as to obstruct the use of said street by vehicles or "pedestrians.

"Fourth. That the grantee of said franchise and his or its succes- "sors and assigns shall and will at all times, upon and after the "completion of said road, during the operation of the same, and "without extra charge, issue to and receive from passengers going in "one direction, transfers good for continuous passage over and upon "any and every other line and lines of any other road or roads

"within the said city which said grantee or his or its successors or "assigns does now or may hereafter own, control, operate, or have a "controlling interest in; and provided, as a further condition, that said "grantee and his or its successors and assigns shall and will at
16 "all times, as aforesaid, issue or cause to be issued to said pas- "sengers without extra charge, a similar transfer from any "and every other line or lines which said grantee or his or its succes- "sors or assigns does now or may hereafter own, control, operate, or "have a controlling interest in as aforesaid, to, over and upon the "road operated and maintained under said franchise.

"Fifth. That the rate of fare for any distance over said road or its "branches one way, shall not exceed five cents for one passenger.

"That persons under the age of eighteen years, who attend the "public schools of said city, shall be required to pay but half fare; "provided, that said pupils shall purchase their tickets in quantities "of at least one dollar's worth at a time; such tickets to be availa- "ble only between the hours of eight a. m. and six p. m., in actual "passage to and from school; and that said grantee and his or "its successors and assigns shall sell such tickets whenever requested "so to do by a pupil who shall present a certificate from a teacher, "approved by the superintendent of schools of the city, that he or "she is a pupil of said schools.

"And, provided further, that said grantee and his or its successors "and assigns shall carry all regular and special policemen and "police officers and firemen, the mayor and councilmen, and letter- "carriers free on said cars, when on duty, subject at all times to the "rules of the road."

"Provided, further, that said grantee and his or its successors and "assigns shall on or before December 15th of each year, pay to the "city tax and license collector of the city of Los Angeles, the annual "license upon each car, that is now or may be hereafter fixed by the "ordinances of said city.

"Sixth. That said grantee and his or its successors and assigns "shall during the life of said franchise pay to the city of Los "Angeles, in lawful money of the United States, two per cent.
17 "of the gross annual receipts of such grantee, and his or its "successors and assigns, arising from the use, operation, or "possession of said franchise. No percentage shall be paid for the "first five years succeeding the date of said franchise, but thereafter "such percentage shall be payable annually, and said franchise is "to be forfeited by failure to make the payments provided for. "Provided, that if the road for which said franchise is granted shall "be an extension of an existing system of street railroad, then the "gross receipts shall be estimated to be one-half of the proportion of "the total gross receipts of said system which the mileage of such "extension bears to the total mileage of the whole system, and said "estimate shall be conclusive as to the amount of the gross receipts "of said extension.

"And provided, further, that if the road for which said franchise "is granted, shall be operated by said grantee, his or its successors "or assigns, in connection with, or as a part of a system of inter-

" urban street railroads, then the gross receipts shall be estimated to " be that proportion of the total gross receipts of the whole of said " system of interurban street railroads which the mileage of the road " for which said franchise is granted bears to the total mileage of the " said whole system, and said estimate shall be conclusive as to the " amount of the gross receipts arising from the use, operation or " possession of said franchise.

" And it shall be the duty of the grantee of said franchise, and of " his and its successors and assigns, to file with the city clerk of the " city of Los Angeles, at the expiration of six years from the date of " the granting of said franchise, and at the expiration of each and " every year thereafter, a statement verified by the oath of said " grantee or his or its successors or assigns, or by the oath of the " manager or presiding officer of said grantee or its successors or
" assigns, showing the total gross receipts and gross earn-
18 " ings collected or received by said grantee or his or its suc-
" cessors or assigns, during the preceding twelve months, from " all traffic over any part of the line for the construction and opera- " tion of which said franchise is granted, or over any part of the " system of street railroad of which it may be an extension, or over " any part of an interurban system of street railroads of which it may " be a part, and from all other sources, and within ten days after the " time for filing aforesaid statement, it shall be the duty of said " grantee and his and its successors and assigns to pay to the city " treasurer of the city of Los Angeles the aggregate sum of the said " percentage upon the amount of the gross annual receipts arising " from the use, operation or possession of said franchise, determined " and computed in the manner hereinbefore provided.

" And any neglect, omission or refusal by said grantee, or his or " its successors or assigns, to file said verified statement or to pay " the said percentage of the said gross annual receipts at the times, " or in the manner hereinbefore provided shall *ipso facto* work a for- " feiture of the franchise herein proposed to be granted and of all " rights thereunder, to the city of Los Angeles.

" Seventh. That the work of constructing said road shall be com- " menced in good faith within not more than four months from the " date of the granting of said franchise, and shall be continuously " prosecuted thereafter in good faith and without unnecessary or " avoidable intermission or delay; that said work of construction " shall be completed within not more than three years thereafter; " that said work of construction shall be commenced at the terminus " of said road farthest from the city hall of said city and continu- " ously prosecuted so that at least one-third of the work of construct- " ing said road shall be completed within one year from the time of " commencement; and that if said work be not so commenced, " prosecuted or completed within the times, or in the manner speci-
" fied, said franchise shall be forfeited.
19 " Eighth. That said grantee or his or its successors or as-
" signs shall not sell, transfer or assign any of the rights or " privileges granted by said franchise, except by a duly executed " instrument in writing filed in the office of the city clerk of the city

"of Los Angeles; and provided further that nothing in said fran-
"chise contained shall be construed to grant to said grantee or his
"or its successors or assigns any right to sell, transfer or assign said
"franchise or any of the rights or privileges thereby granted, except
"in the manner aforesaid.

"Ninth. That the grantee of said franchise shall within five days
"after such franchise is awarded, file with the city council of the
"city of Los Angeles, a bond running to said city, with at least two
"good and sufficient sureties, to be approved by said city council, in
"the penal sum of twenty-five thousand dollars ($25,000), condi-
"tioned that said grantee, his or its successors or assigns, shall well
"and truly observe, fulfill, and perform each and every term and
"condition of said franchise, and that in case of any breach of con-
"dition of such bond, the whole amount of the penal sum therein
"named shall be taken and deemed to be liquidated damages,
"and shall be recoverable from the principal and sureties upon said
"bond. In case said bond shall not be so filed, the award of such
"franchise shall be set aside, and the same may be granted to the
"next highest bidder, or again offered for sale, in the discretion of
"said city council.

"Tenth. That any neglect, failure or refusal to comply with any
"of the conditions of said franchise, shall thereupon immediately
"*ipso facto* effect a forfeiture thereof, and the said city, by its city
"council, may thereupon declare said franchise forfeited and may
"exclude said grantee, his or its successors and assigns, from further
"use of the streets of said city under said franchise, and said grantee
"and his or its successors and assigns, shall thereupon and
"immediately surrender all rights in and to the same, and
"said franchise shall be deemed and shall remain null, void
"and of no effect.

"Notice is also hereby given that sealed bids in writing will be
"received for the said franchise up to 11 o'clock in the forenoon of
"the 10th day of February, 1902; that the bids received will be
"opened at that time; that all bids must be for the payment of a
"stated sum in gold coin of the United States; and that said fran-
"chise will be granted to the person, firm or corporation who shall
"make the highest cash bid therefor; provided, only, that at
"the time of opening said bids any responsible firm, or corporation,
"present or represented, may bid for said franchise a sum not less
"than ten per cent. above the highest sealed bid therefor, and said
"bid so made may be raised ten per cent. by any responsible bidder
"present, and said franchise will finally be struck off, sold and granted
"by said city council to the highest bidder therefor in gold coin of
"the United States, and said successful bidder will be required to
"deposit with said city council, or such person as it may direct,
"the full amount of his or its bid within twenty-four hours thereafter,
"and in case he or it shall fail to do so, then the said franchise shall
"be granted to the next highest bidder therefor, and that the city
"council reserves the right to reject any or all bids, provided, that
"no bid, whether sealed or otherwise, shall be received or considered

"unless the same be in writing and subscribed by a responsible bid-
"der, or by his or its duly authorized agent.

"C. H. HANCE,
"*City Clerk of the City of Los Angeles.*"

XIII.

Your orator further alleges that in pursuance of the said proceedings taken by the said council of the city of Los Angeles, and
21 of the said notice so published, your orator did, prior to 11 o'clock in the forenoon of the 10th day of February, 1902, deliver a sealed bid to the said council of the city of Los Angeles, for the said franchise and privileges in the said notice described, and did bid therefor the sum of twenty-five thousand dollars ($25,000.00.)

XIV.

Your orator further alleges that the said Wm. S. Hook, who is the president of the Los Angeles Traction Company, did present to the said council a sealed bid for the said franchise described in the said notice, bidding therefor the sum of thirty-seven thousand five hundred dollars ($37,500.00).

XV.

Your orator further alleges that the defendant, E. A. Davis, presented a sealed bid, offering to purchase the said franchise for the sum of one hundred and thirty-nine thousand dollars ($139,00-.00).

XVI.

Your orator further alleges that one, E. Murray, presented a sealed bid to said council, offering to purchase the said franchise for the sum of four hundred and fifteen thousand dollars ($415,000.00); and that the said bids hereinbefore enumerated were the only bids presented to the said council; and that the said bids, and each of them, was received by the said council, and on the said 10th day of February, 1902, were opened, and there being no bid of ten per cent. upon the amount bid by the said E. Murray, the said council did on the same day accept the said bid of the said E. Murray, and ordered that the said franchise be struck off, sold and granted to the said E. Murray, and thereupon the said council ordered that the city treasurer be authorized and directed to receive the money to be paid for such franchise by the said E. Murray, and upon motion of Wm. M. Bowen, duly seconded, the said council did order and declare that the period of twenty-four hours within which the said E. Murray is allowed by law to pay for the said franchise, should expire at 3.15 o'clock p. m. of February 11, 1902.

22 XVII.

Your orator further alleges that in truth and in fact the said bid of Wm. S. Hook, and the bid of E. A. Davis, and the bid of E. Murray, were all made on behalf of the said Los Angeles

Traction Company; and that the said bids were so made with the fraudulent intent to prevent competition in the bidding before the council. And your orator alleges that the said bid of the said E. Murray for the sum of $415,000.00 was put in and at the suggestion and for the benefit of the said Los Angeles Traction Company, and with the fraudulent intent to prevent any further bidding when the sealed bids were opened; the said Los Angeles Traction Company and the said Wm. S. Hook, and the said E. A. Davis, well knowing that no bid of ten per cent. upon the bid of E. Murray would or could be made for the said franchise, and well knowing that the said franchise was not worth the said sum of $415,000.00.

XVIII.

Your orator further alleges that the said E. Murray is not a person of any financial standing, and was not worth at the time the said bid was made, or at any time since, one thousand dollars ($1000.00), and could not either from any funds of his own or through any credit of his own, have paid, and never intended to pay the said sum of $415,000 or any part thereof; all of which was well known and understood by the said Los Angeles Traction Company, and the said E. A. Davis, and the said Wm. S. Hook. And the said E. Murray did not pay the said sum of $415,000.00 within twenty-four hours, and never offered to pay the said sum or any sum at any time, and never appeared before the council on the 11th day of February, 1902, nor at any other time.

XIX.

Your orator further alleges that the Los Angeles Traction Company, and the said E. A. Davis, and the said Wm. S. Hook, the agents of the said company, did appear before the said council
23 on the said 11th day of February, 1902, and when the twenty-four hours expired, and in pursuance of the fraudulent scheme to prevent competition in the bidding, claimed and pretended that the said council of the city of Los Angeles had no power or authority under the act aforesaid to do any other thing or take any other proceedings looking to the sale of the said franchise, save and except to accept the bid next highest to that of the said E. Murray, to wit, the bid of E. A. Davis for the sum of $139,000.00 and thereupon to sell and grant to the said E. A. Davis the said franchise, and demanded that the said franchise be awarded to the said E. A. Davis on said bid, and for the benefit of the said Los Angeles Traction Company.

XX.

Your orator further alleges that throughout the said proceedings the said E. A. Davis was acting for and on behalf and in the interest of the said Los Angeles Traction Company, and sought to obtain the grant of the said franchise to himself, but for the benefit of the said defendant, The Los Angeles Traction Company.

XXI.

Your orator further alleges that on the 10th day of February, 1902, at the opening of the said bids, including that of the said E. Murray, there were no further bids offered by any person, save only those which have been hereinbefore set forth.

XXII.

Your orator further alleges that your orator, having before the twenty-four hours expired from the time of the opening of the said bids on the 10th day of February, 1902, become apprised of the fact that the said bid of the said E. Murray was a fraudulent contrivance of the said Los Angeles Traction Company, Wm. S. Hook and E. A. Davis, intended by them to prevent any further offer or bid, and knowing that said E. Murray would not appear within twenty-four hours and pay the said bid or any part thereof, did appear by its duly author-
24 ized agents before the said city council on the said 11th day of February, 1902, and prior to the expiration of the said twenty-four hours did present in writing a bid of one hundred and fifty-two thousand nine hundred dollars ($152,900.00) for said franchise, and being ten per cent. over and above the bid of the said E. A. Davis, and when the said twenty-four hours had expired did offer to the said council of the said city of Los Angeles the said sum of $152,900.00.

XXIII.

Your orator further alleges that upon the presentation of the said bid by your orator on the 11th day of February 1902, for the said sum of $152,900.00 for the said franchise, the said council did call before them the said city treasurer, and the said city treasurer did thereupon inform said council that the purchase-money for the said franchise so sold to E. Murray had not been paid. And thereupon Mr. E. L. Blanchard, a member of the said council, moved that the said E. Murray be declared a fraudulent and irresponsible bidder for the electric railway franchises for which he had presented his bid, and each of them, and his said bids null and void, which motion was seconded by R. A. Todd, another member of the said council. And the said motion so made by the said E. L. Blanchard and seconded by the said R. A. Todd, was carried by the vote of seven of the councilmen, to wit: A. A. Allen, E. L. Blanchard, Wm. M. Bowen, B. S. Laudier, George P. McLain, W. H. Pierce, and R. A. Todd, there being no votes against the said motion, except the vote of Frank Walker, and P. W. Powers, members of the said council, and P. W. Powers, president thereof.

XXIV.

Your orator further alleges that after the said order of the said council declared the said bids of the said E. Murray fraudulent and null and void, the matter of the sale of the said street railway franchise over the route commencing at the intersection of Seventh

and Spring streets, was taken up for consideration, and thereupon your orator did bid for the said franchise the said sum of
25 $152,900.00, and being the same franchise described in the notice of sale hereinbefore set forth. And your orator did at the same time that the said bid was made, present to the said council of the city of Los Angeles, a certificate of deposit, drawn on the Farmers' & Merchants' Bank of Los Angeles, payable to the city of Los Angeles, for the said sum of $152,900. That thereupon the president of the council did at the same meeting call for bids to purchase the said franchise other or above the bid so made by your orator, as aforesaid, and no other bids were made or received by the said council. And thereupon, on motion of the said E. L. Blanchard, one of the said council, seconded by A. A. Allen, another of the said council, it was ordered that the said street railway franchise, over the said route, be struck off, sold and granted to The Pacific Electric Railway Company, your orator, for the said sum of $152,900, and that the said treasurer be, and he was, authorized and directed to receive the purchase-money. That the said order was made, striking off, selling and granting to the said Pacific Electric Railway Company the said franchise described in the said notice hereinbefore set forth, for the said sum of $152,900.00, and authorizing and directing the said treasurer to receive the said purchase-money, and was carried by vote of six members of the said council, to wit, A. A. Allen, E. L. Blanchard, B. S. Lauder, George P. McLain, W. H. Pierce and R. A. Todd. And your orator further alleges that under and in pursuance of the said order, the said sum of $152,900 was paid by your orator to the treasurer of the city of Los Angeles, in gold coin of the United States, for said franchise, and was accepted by the said treasurer and by the said council of the city of Los Angeles. And thereupon and immediately your orator did, as principal, and John D. Bicknell and Wm. G. Kerchkoff, as sureties, execute a bond in the sum of twenty-five thousand dollars ($25,000.00), as provided for in the said notice of sale and said statute of the State of Cali-
26 fornia, conditioned for the faithful performance of the terms of said street railway franchise, over the said route commencing at the intersection of Seventh and Spring streets, and did deliver the same to the said council of the city of Los Angeles. And thereupon the said council did approve the said bond, and accept the same, and did cause the same to be filed in the office of the city clerk of the city of Los Angeles. And thereupon the said money having been paid to the city treasurer, as aforesaid, and the said bond, which was in all respects in conformity with the said act of the legislature of the State of California, and of the said notice of sale, having been accepted and approved, the said council of the said city did thereupon finally strike off, sell and grant to your orator the said franchise.

XXV.

Your orator further alleges that several street railway franchises had been offered for sale by said council at about the same time, and bids were received upon each of them, and the said E. Murray had

interposed a bid upon each of them, and the said franchises had been awarded to the said Murray, and the said Murray had failed to make payment on his bid upon any of them and that in the resolution or motion made by the said E. L. Blanchard, and seconded, and carried by the said council, declaring his said bids and each of them fraudulent, the said council were referring to bids of the said Murray for the franchise hereinbefore described, and also said other franchises.

XXVI.

Your orator further alleges that the said E. A. Davis, and the said Wm. S. Hook, and the said Los Angeles Traction Company, did on the said 11th day of February, 1902, claim and pretend that the said E. A. Davis had become entitled to the said franchise hereinabove set forth, and did then and there tender to said council the amount of the bid of the said E. A. Davis, to wit, $139,000.00,
27 gold coin, but which said tender was refused by the said council of the city of Los Angeles. And the said E. A. Davis and Wm. S. Hook, and the said Los Angeles Traction Company did then and do now claim an interest in the said franchise, and claim that the said E. A. Davis is the owner thereof, and do make said claim adversely to your orator.

XXVII.

Your orator further alleges that the said claims of the said defendants, E. A. Davis, Wm. S. Hook, and The Los Angeles Traction Company are and each of them is without any foundation whatever, and they have not nor has either of them any right, title or interest in the said franchise, nor any right to construct a street railroad or operate cars thereon on any of the said streets mentioned therein, or to exercise any of the franchise rights or privileges so struck off, sold and granted to your orator.

XXVIII.

Your orator further alleges that after your orator had paid the said sum of $152,900.00, to the city treasurer, and executed and delivered to the said city council the bond as aforesaid, and said bond had been accepted and approved by the city council and filed in the office of the city clerk, and after the said council of the city of Los Angeles had struck off, sold and granted to your orator the said franchise, and after the title of your orator to said franchise, rights and privileges, so purchased by it had vested and accrued, the said city council did pass an ordinance granting the said rights, privileges and franchises to your orator, and presented the said ordinance to the said M. P. Snyder, as mayor of the city of Los Angeles, and the said M. P. Snyder did afterwards and before the 21st day of February, 1902, return the said ordinance without having affixed his signature thereto, or approved the same, and with his objections to the said ordinance. And thereafter, to wit, on the 21st day of February, 1902 the said council did, by reason of the said mayor's disapproval of the said ordinance,

adopt a motion that the said ordinance should be re-
28 considered, and upon the vote being again taken upon the passage of the said ordinance, notwithstanding the mayor's veto, the said council did vote against the passage of said ordinance. And thereupon and on the same day the said city council passed a resolution pretending and purporting to order any and all bids for the said electric street railroad franchises in the said city of Los Angeles, to wit the said franchise, rights and privileges so purchased by your orator, and including the bid made by your orator for the said franchise, rights and privileges hereinbefore set forth, to be rejected and directing and pretending to authorize the said treasurer of the city of Los Angeles to refund to your orator the said sum of $152,900.00, so bid and paid by your orator for the said franchise, and did order the said city clerk to return the said bond in the sum of $25,000.00, executed as hereinbefore set forth, to your orator. And your orator further alleges that all of the said proceeding attempting to deprive your orator of the said property, as hereinabove set forth, was taken by the said council under the pretense that the approval of the mayor of the city of Los Angeles to the said ordinances was necessary to give it validity or to make effectual the grant made by the said city of Los Angeles to your orator of the said franchise, rights and privileges. But your orator alleges that under the said statute of the State of California hereinbefore set forth, the council of the city of Los Angeles had no discretion as to, or in the disposing of, the bid of your orator for the said property right, franchise and privileges; but, on the contrary, were by the operation of the said act of the legislature ordered to strike off, sell and grant the same to your orator, and no ordinance was necessary to perfect the said grant, and the said mayor of the city of Los Angeles was not authorized to perform any function in, about or concerning the said sale of franchises, rights and privileges, under the said act, and had no power either to approve or disapprove any such sale, and the said pretended veto of the said ordinance by the said mayor
29 was wholly void and had no effect whatever upon the rights of your orator. But, on the contrary, the title of your orator was fully vested under the statute, and there was no power or authority, either in the mayor or the council, or in both, to in any manner affect the rights which had accrued to your orator by virtue of its purchase.

XXIX.

Your orator further alleges that at the same session of the said council, Wm. M. Bowen, one of the members thereof, moved that the applications of the Pacific Electric Railway Company for franchises over certain streets in the city of Los Angeles be referred to the board of public works, and that said board redraft notice of sale of the same; and which motion being duly seconded, was by the said council carried; and that among the said applications of your said orator referred to in the said motion, was included the said application upon which the said sale was made to your orator

as aforesaid of the franchise, rights and privileges, hereinbefore described.

XXX.

Your orator further alleges that it had become vested with the title to the franchises, and it is now the absolute owner of the said franchises so granted to it as hereinbefore set forth, and that the said resolutions or the orders of the council pretending to reconsider the said vote and readvertising the said application of your orator for the purchase of the said franchise, and all other proceedings taken for the purpose of vacating and setting aside the grant so made to your orator, have been made, taken and had by the said council without any authority whatever, and such action has been taken with the intent to deprive your orator of its said property without due process of law and in violation of the provisions of the Constitution of the United States, prohibiting any State from depriving any person of life, liberty or property without due process of law.

30 XXXI.

Your orator further alleges that by the provisions of the statute under which its said property rights were acquired, and also by the notice of sale and the order granting the said franchise to your orator, it is required to commence the construction of the said road and to commence work thereon in good faith within not more than four months from the granting of the said franchise, to wit, from the said 11th day of February, 1902 and is required to complete the same within three years after said date.

XXXII.

Your orator further alleges that it is desirous of performing the conditions of the said grant and to maintain and preserve its property rights in the said franchises, and for that end desires to commence work upon the same in the construction of the said road and for the purpose of completing the same at the earliest practicable moment, and to operate its cars and exercise its said privileges and franchises as soon as practicable; and your orator further alleges that the construction of the said road and the operation of cars thereon, and the exercise of the said franchises are necessary to facilitate public business and transportation, and that from the operation of the said roads and the exercise of the said franchise and privileges large profits will accrue to your orator.

XXXIII.

Your orator further alleges that the said council of the city of Los Angeles and other public authorities threaten and intend to prevent your orator from constructing or attempting to construct the said street railway on any public street in the city of Los Angeles, and they will forcibly prevent your orator from constructing or attempting to construct the street railway upon the streets mentioned in the said franchise, or any of them, or exercising any other right,

privilege or franchise so granted to your orator. And on the
31 26th day of February, 1902, the said city council did pass an order instructing the mayor, the street superintendent, and the chief of police, to stop and prevent any attempt that your orator might make to construct any street railway on any of the said public streets, with all the force at their command. And your orator further alleges that the said public officers and police force of this city, acting under the said instructions, will undertake by violence to prevent your orator from constructing said railway or attempting to construct, or exercising any of the said privileges or franchises, or having any enjoyment of its said property so acquired as aforesaid, unless prevented by this court.

XXXIV.

Your orator further alleges that by the said grant made by the said council of the city of Los Angeles to your orator on the 11th day of February, 1902, the said council did grant to your orator and its assigns, the right, privilege and franchise to construct and for the period of forty years to operate and maintain a double-track electric street railroad over the route and along and upon the streets and portions of streets in the said city of Los Angeles, as described in the said notice hereinbefore set forth. And that the said grant did also grant to your orator and its assigns the right to construct and maintain all necessary switches, turnouts, curves, connections at street intersections, power-houses, and all other appliances, property, constructions and attachments, that might be necessary for the purpose of operating the said road and enable it to be as effective as the best electric street railroad. And it was provided therein that the said railroad should be constructed and at all times operated and maintained, and said right, privilege and franchise granted should at all times be exercised and enjoyed in accordance with and subject to each and every of the terms and conditions of the said grant, and not otherwise. That such street railroad constructed and operated under the said franchise, should be used only for the transportation of passengers and United States
32 mail, and for the transportation, subject to the conditions and restrictions in the said grant mentioned, of baggage and such packages and commodities as could be conveniently handled and carried in enclosed cars of the character therein described. And said grant was also upon all the other terms and conditions which were mentioned in the said notice, including the provision that the work of constructing the said road should be commenced in good faith within not more than four months from the date of the grant of the franchise, and continuously prosecuted thereafter in good faith and without unnecessary or avoidable intermission or delay, and said work of construction should be completed within not more than three years thereafter; and that said work of construction should be commenced at the terminus of said road furthest from the city hall of said city, and continuously prosecuted so that at least one-third of the work of constructing said road should be completed within one year from the time of commencement; and

that if said work were not so commenced, prosecuted or completed within the time and in the manner specified, the said franchise should be forfeited.

And your orator alleges that the said franchise which was so offered for sale, and upon which the said bids were made, and for which your orator bid the said sum of $152,900, were the same franchise, rights and privileges mentioned in the said notice for bids hereinbefore fully set forth, and with all the terms and conditions therein in the said notice specified; and the said bid of $152,900.00 was accepted by the said council of the said city for the said franchise, under the said terms and conditions and subject to all of the provisions mentioned in the said notice, and not any other or different franchise or different terms or conditions; and the said sum was paid by your orator for the said franchise, rights and privileges, and accepted by the said council as the highest bid for and price paid for said franchise, rights and privileges, under the said terms and conditions, and no others; and said franchise, rights and
33 privileges so described in the said notice, with all of the terms and conditions specified therein were struck off, sold and granted to your orator on the said 11th day of February, 1902, for and in consideration of the payment of the said sum.

XXXV.

Your orator further alleges that the said bond executed by your orator as principal, and the said John D. Bicknell and William G. Kerchkoff, as sureties, by which they were jointly and severally held and firmly bound unto the city of Los Angeles in the sum of $25,000, to be paid to the city of Los Angeles, did recite and refer to the said franchise to construct, operate and maintain a double-track electric street railroad for a period of forty years over the route and along and upon the streets in the city of Los Angeles, State of California, described in the said bond, and which description was the same as in the said notice contained, together with the right to construct all necessary switches, turnouts, curves, and connections at street intersections, power-houses, and all other appliances, properties, structures and attachments that might be necessary for the purpose of operating said road and enabling it to be as effective as the best electric street railroad, which was on the 11th day of February, 1902, sold and awarded by the said council of the city of Los Angeles to the said Pacific Electric Railway Company, subject to the terms and conditions mentioned and contained in the notice of sale of said franchise, a copy of which was attached to the bond and made a part thereof; and said bond was conditioned that if the said Pacific Electric Railway Company, its successors and assigns, should well and truly observe, fulfill and perform each and every term and condition of said franchise mentioned and contained in the said notice of sale, that the said obligation should be void, otherwise to remain in full force and effect. And said bond was executed to secure the performance of the said conditions mentioned in the said grant of said franchise so sold to your orator on the said 11th day
34 of February, 1902, for the said sum of $152,900.00.

XXXVI.

Your orator further alleges that your orator did thereupon, upon the award and grant of the said franchise to your orator by the said council of the city of Los Angeles, become vested with the title to the said franchise, rights, and privileges so sold to your orator, and become bound by all the terms and conditions by which your orator was to hold the said property mentioned therein, and your orator ever since has been and still is the owner in fee of all the said rights and privileges and franchise therein granted, and subject to the said terms and conditions on said grant.

XXXVII.

Your orator further avers that in order to perform the said conditions, and especially in order to construct the said road and put the same in operation, as in the said contract provided, it is necessary that your orator should begin immediate construction thereof; that in order to commence such construction, it will be necessary for your orator to incur great expense in the purchase of necessary material, machinery and appliances of all kinds, necessary to the construction of the said road, turnouts, switches, and other adjuncts and auxiliaries to the operation of the said road, and to provide rolling stock and other appliances necessary to the equipment and operation of the said road; and that contracts will have to be made for the purchase thereof, laborers will have to be employed, and contracts made for the construction of the said road, and work commenced thereon immediately. And your orator alleges that the said city of Los Angeles and the said city council have threatened and do intend and will, unless restrained by this court, prevent your orator from commencing the construction of the said road and those works and appliances, adjuncts and auxiliaries necessary to the construction and operation of the said railroad, and the exercise of the said rights, privileges and franchise so purchased by your orator;
35 and that such interference will be made by and through the use of the police force of the city of Los Angeles; and your orator will by force and violence be by said city and said city council and its officers, prevented from the enjoyment of its said property and the exercise of its said rights and privileges, and the construction of the said road and putting the same in operation; and by reason thereof your orator — prevented from having any use, benefit and advantage which would accrue to it from the operation of the said road and the exercise of the said privileges and franchise, and which it ought in right to have under the grant so made to it.

XXXVIII.

Your orator further alleges that the said orders made by the said council after the granting of the franchise aforesaid to your orator, pretending to reconsider the same and to vacate and set aside the said grant to your orator, referred to the said franchise, rights and privileges hereinbefore described, and for which your orator had

paid to the said city of Los Angeles, the said sum of $152,900. And your orator further alleges that the said council of the said city of Los Angeles do threaten and intend and will, unless restrained by this court, offer the said franchise, rights and privileges for sale again, and will, if any bids are made therefor, sell or attempt to sell the same, and grant or pretend to grant the same rights, privileges and franchise to any person making the highest bid therefor at such attempted resale.

XXXIX.

Your orator further alleges that the said proceedings so taken by the said council, reconsidering the said vote and attempting to cancel and annul the said grant so made to your orator, were utterly void and of no effect whatever; yet, nevertheless, such resale will cast a cloud upon the title of your orator, and your orator will be greatly hindered and impeded in the exercise of the said franchise, and in the use and enjoyment of the property so belonging to it under the said grant.

36

XL.

Your orator further alleges that the said council of the city of Los Angeles, in furtherance of their purpose and design to deprive your orator of the property rights so acquired by it under its purchase of the said franchise, rights and privileges aforesaid, did instruct the treasurer of the city of Los Angeles to return the said $152,900.00, to your orator, and also to return the bond which had been executed as aforesaid, and unanimously approved by the council and filed with the city clerk, to your orator; and the said treasurer of the said city and the clerk of the council, acting under the instructions of the said council did offer to return the said sum of money and the said bond, but your orator refused to accept either the said money or the said bond, and denied the right of the said council of said city to vacate or annul the said grant so made to your orator, or to in any manner affect the rights of your orator so acquired under the said purchase.

XLI.

Your orator further alleges that if the said council of the city of Los Angeles does sell the said franchise, rights and privileges, again to any other person, they will, as your orator is informed and believes and therefore alleges, aid such purchaser, with the police force of the city of Los Angeles, to take possession of the said property, route, franchise, rights and privileges, and to construct the said road over and along the said streets and to oust and exclude your orator therefrom. And your orator would be compelled to resort to a multiplicity of suits to protect its property rights, and be at great expense in protecting and defending the rights, privileges and franchise so purchased by it, and its right to exercise and enjoy the same. And your orator, in order to maintain its said property rights, will be compelled to expend a large sum of money in providing for the con-

struction of said road and in constructing the same, or else to
37 hazard the forfeiture of its right, by refraining from making such expenditures and incurring obligations for large sums of money for such material and appliances as are necessary in the construction thereof. And your orator would suffer great and irreparable damage, and such damages as cannot be compensated in money.

XLII.

Your orator further alleges that the said acts of the said council of the city of Los Angeles, in attempting to repeal, rescind, vacate and annul the said grant so made to your orator, and the acts of the said council providing and ordering the mayor and the police force of the city to forcibly wrest the said property from your orator, and to prevent your orator from exercising the rights, privileges and franchises granted to it, and threatening resale thereof, are each and all of them, and all proceedings taken by the said council to divest your orator of the said rights or to impair the same, or to prevent your orator from exercising the said rights, franchises and privileges, are in violation of the Constitution of the United States and are void. And your orator has no adequate remedy either for the enforcement of its rights or protecting its said property, save only in a court of equity.

XLIII.

Your orator further alleges that the matter in dispute in this action exceeds, exclusive of interest and costs, the value of two thousand dollars ($2,000.00) and is of a value of not less than one hundred fifty-two thousand, nine hundred dollars ($152,900.00).

To the end that your orator may obtain relief in the premises in this honorable court, where alone relief can be afforded, your orator prays that a writ of subpœna be granted to your orator against the defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen,
B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the
38 council of the city of Los Angeles, M. P. Snyder, mayor of the city of Los Angeles, The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis; and your orator prays that the said defendants may be required to answer the allegations of this bill, but not under oath—an answer under oath being waived—and that upon the final hearing of this cause it be adjudged and decreed that your orator is the owner in fee-simple of the said property rights, franchise and privileges granted to it, as herein set forth, subject to the terms and conditions of the said grant, and that the said defendants have not, nor have either of them any right, title or interest in said property rights, privileges or franchise aforesaid, or any part thereof.

And that it be further adjudged and decreed that the said orders or resolutions of the council of the city of Los Angeles pretending to reconsider the vote by which the said right, privileges and franchise were granted to your orator, and all proceedings taken by the said

council for the purpose of divesting the title of your orator to said property, rights, privileges and franchise, and all of said proceedings attempting to impair the contract rights of your orator under the said grant, or to hinder or impede your orator in the use and enjoyment of its said property rights, franchise and privileges, or to rescind, vacate or set aside the said sale so made to your orator of the said franchise, rights and privileges, are null and void and have no effect whatever, and that they be vacated and set aside, and that the said defendants and each of them and all of the officers, agents, employees and attorneys of the said defendants, and each of them, be forcibly restrained from preventing your orator from constructing the said road, turnouts, switches, and all of the various adjuncts and auxiliaries and works authorized to be constructed by the grant aforesaid, or preventing your orator from operating its said road and exercising all or any of the rights, privileges or franchises so granted to your orator, and that they be restrained from
39 in any manner interfering with such construction, operation and exercise, or interfering with your orator in the exercise of any of the rights, privileges or franchise therein granted, or from taking or attempting to take the property of your orator, or from ousting or attempting to oust or dispossess your orator therefrom, or in any way preventing your orator from having the full use and enjoyment of its said property and exercising the said franchise, rights, and privileges, or defeating, impairing or interfering with any right of your orator arising or accruing to your orator under the said grant.

And your orator further prays that an order be issued by this court directing the said defendants and each of them to appear at a time to be fixed by the court, and show cause why a writ of injunction should not be issued, pending this action, restraining the said defendants and each and every of them, their officers, agents, servants, attorneys, or employees, from preventing your orator from constructing said road, or in any manner interfering with the said construction of said road or any of its auxiliaries, adjuncts, switches, turnouts, and every other thing by the said grant authorized to be constructed, or preventing or attempting to prevent your orator from exercising all of the rights, privileges and franchise so granted to it, or impeding your orator in any manner in the full use and enjoyment of its said property, rights, privileges and franchise; and for all such other and further relief as may be just and proper.

J. S. CHAPMAN AND
BICKNELL, GIBSON & TRASK,
Solicitors for Complainant.
HUNSAKER & BRITT,
WORKS & LEE,
W. F. FITZGERALD,
DUNN & CRUTCHER, *Of Counsel.*
PACIFIC ELECTRIC RAILWAY COMPANY,
[SEAL.] By EDWARD E. BACON, *Secretary.*

40 UNITED STATES OF AMERICA, } ss:
District of Southern California, }

On this 8th day of March, 1902, before me personally appeared Epes Randolph who being by me duly sworn, deposes and says, that he is the vice-president and general manager of The Pacific Electric Railway Company, the complainant in the foregoing bill; that he has heard read the same, and knows the contents thereof, and that the same is true.

EPES RANDOLPH.

Subscribed and sworn to before me this 8th day of March, 1902.
[SEAL.] R. W. DARBY,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) No. 1018 In the United States circuit court ninth circuit southern district of California Pacific Electric Railway Company plaintiff *vs.* City of Los Angeles *et al.* defendants Bill of complaint. Filed Mar. 8 1902 Wm. M. Van Dyke clerk —— —— deputy Jno. S. Chapman Bicknell Gibson & Trask attorney-for complainant.

41 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. In Equity.

The President of the United States of America to the City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, and E. L. Blanchard, composing the council of the city of Los Angeles; M. P. Snyder, mayor of the city of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Greeting:

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the court-room in Los Angeles, on the 7th day of April, A. D. 1902, to answer a bill of complaint exhibited against you in said court by the Pacific Electric Railway Company, a corporation, duly organized and existing under the laws of the State of California, and a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of March, in the year of our [SEAL.] Lord one thousand nine hundred and two and of our Independence the one hundred and twenty-sixth.

WM. M. VAN DYKE, *Clerk*,
By —— ——, *Deputy Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required. to enter your appearance in the
42 above suit, on or before the first Monday of April next, at the clerk's office of said court pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

WM. M. VAN DYKE, *Clerk,*
By —— ——, *Deputy Clerk.*

Clerk's office: Los Angeles, California.

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify, that I received the within writ on the 8th day of March 1902, and personally served the same on the 10th day of March 1902, on R. A. Todd, E. L. Blanchard and Wm. S. Hook by delivering to and leaving with R. A. Todd E. L. Blanchard and Wm. S. Hook said defendants named therein, personally, at the county of Los Angeles in said district, a certified copy thereof

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

Los Angeles, Mar. 11th 1902

43 UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March 1902, and personally served the same on the 8th day of March 1902, on W. H. Pierce by delivering to and leaving with W. H. Pierce the said defendant named therein, personally, at the county of Los Angeles in the said district, a copy thereof.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

Los Angeles, Cal., Mar. 11th 1902.

OFFICE OF THE U. S. MARSHAL,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March 1902, and personally served the same on the 17th day of March 1902, on E. A. Davis by delivering to and leaving with E. A. Davis the said defendant named therein, personally, at the county of Los Angeles in the said district, a copy thereof.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

Los Angeles, Cal., March 17th, 1902.

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March 1902, and personally served the same on the 10th day of March 1902, on the City of Los Angeles by delivering to and leaving with M. P. Snyder mayor of the city of Los Angeles said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

Los Angeles, Mar. 11th 1902.

44

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on the Los Angeles Traction Company by delivering to and leaving with T. J. Hook, president of The Los Angeles Traction Company said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March 1902, and personally served the same on the 8th day of March 1902, on Wm. M. Bowen by delivering to and leaving with Wm. M. Bowen said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on B. S. Lauder by delivering to and leaving with B. S. Lauder the said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

45 UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on Geo. P. McLain by delivering to and leaving with Geo. P. McLain the said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on Frank Walker by delivering to and leaving with Mrs. Frank Walker an adult member of the family of the said Frank Walker at the residence of the said Frank Walker the said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on M. P. Snyder by delivering to and leaving with Mrs. M. P. Snyder an adult member of the family of the said M. P. Snyder at the residence of the said M. P. Snyder the said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

46 UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on A. A. Allen by delivering to and leaving with Mrs. Emeline Winslow an adult member of the family of the said A. A. Allen at the residence of the said A. A. Allen the said defendant

named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof,

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 8th day of March, 1902, and personally served the same on the 8th day of March, 1902, on P. W. Powers by delivering to and leaving with Mrs. P. W. Powers an adult member of the family of the said P. W. Powers, at the residence of the said P. W. Powers, the said defendant named therein, personally, at the county of Los Angeles in the said district, a certified copy thereof.

Los Angeles, Cal., Mar. 11th, 1902.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

(Endorsed :) Marshal's doc. No. 451 Original. No. 1018 U. S. circuit court ninth circuit, southern district of California. Southern division. In equity. Pacific Electric Company, a corporation *vs.* The City of Los Angeles, *et al.* Subpœna. Filed Mar. 18 1902 Wm. M. Van Dyke clerk —— —— deputy.

47 In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants. } In Equity.

The demurrer of the above-named defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles; M. P. Snyder, mayor of the city of Los Angeles, to the bill of complaint of the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, do demur to the said bill. And for causes of demurrer show:

I.

That it appeareth by the plaintiff's own showing by the said bill that this court has no jurisdiction of the subject-matter of this suit.

II.

That there is no equity in said bill, and it appeareth by
48 the plaintiff's own showing by said bill that it is not entitled to the relief prayed by said bill against these defendants, or any of them.

III.

That said bill is defective in certainty in this, that it cannot be determined therefrom what number of franchises is embraced in the notice of sale set forth in paragraph XII of said bill, whether one franchise or more than one franchise;

That said bill is defective in certainty in this, that it cannot be determined therefrom what number of franchises was offered for sale, sold, or granted by the city council of the city of Los Angeles, pursuant to the notice of sale set forth in paragraph XII of said bill, whether one franchise or more than one franchise.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court, whether they shall be compelled to make any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

W. B. MATHEWS,

Solicitor for Defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles.

CITY HALL, LOS ANGELES, CAL.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. B. MATHEWS,

49 *Solicitor for Defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles.*

Los Angeles, Cala., April 24, 1902.

STATE OF CALIFORNIA,
City of Los Angeles, County of Los Angeles, Southern District of California, Southern Division, } ss:

P. W. Powers being duly sworn, deposes and says: I am one of the above-named defendants. The foregoing demurrer is not interposed for delay.

P. W. POWERS.

Subscribed and sworn to before me, this 24th day of April, 1902.
HARTLEY SHAW,
[SEAL.] *Notary Public in and for the County of Los Angeles, State of California.*

(Endorsed:) (Original.) No. 1018. In the circuit court of the United States, for the southern district of California, Pacific Electric Railway Co., plaintiff *vs.* City of Los Angeles, *et al.*, defendants. *Demurrer.* Received copy of the within demurrer this 24 day of April 1902 Bicknell Gibson and Trask *et al.* attorneys for pl'nt'f Filed Apr. 24 1902 Wm. M. Van Dyke clerk —— deputy W. B. Mathews city attorney city hall, Los Angeles, Cal. attorney for defendants.

50 In the United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. Pierce, George P. McLain, Frank Walker, Wm. H. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants. } Demurrer.

The demurrer of the above-named defendants, Los Angeles Traction Company, William S. Hook, and E. A. Davis, to the bill of complaint of the above-named complainant.

These defendant-, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, do demur to the said bill; and for causes of demurrer showeth:

First. That it appeareth by the complainant's own showing in the said bill that this court hath not jurisdiction over the subject-matters of the said bill and hath not jurisdiction over the subject-matters of this action, for that it appears by the said bill that the complainant and the defendants are not citizens of different States, but that the complainant hath not attempted to show any other ground or basis of jurisdiction than this: That the action arises
51 under the Constitution of the United States; but upon complainant's own showing in the said bill this cause doth not arise under the Constitution.

Second. That there is no equity in said bill and it appeareth by the complainant's own showing in the said bill that the complainant is not entitled to the relief prayed for by the bill or to any relief, against these defendants or against any of them.

Wherefore, and for divers other good causes of demurrer appear-

ing on the said bill, these defendants do demur thereto; and humbly pray the judgment of this honorable court whether they shall be compelled to make any other or further answer to the said bill; and humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

GARRETT McENERNY,
E. E. MILLIKIN,
GIBBON, THOMAS & HALSTEAD,
Solicitors for Defendants Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis.

Counsel:
PERCY WILSON.
CAMP & LISSNER.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

E. E. MILLIKIN,
Solicitor for Defendants Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis.

Los Angeles, California, April 24th, 1902.

STATE OF CALIFORNIA,
County of Los Angeles, Southern District of California, Southern Division, } ss:

T. J. Hook, being duly sworn, deposes and says: That he is now and for a long time past has been the president of the defend-
52 ant corporation, Los Angeles Traction Company; and that he makes this affidavit for and on behalf of said Los Angeles Traction Company; and says that the foregoing demurrer is not interposed for delay.

THOMAS J. HOOK.

Subscribed and sworn to before me this 24th day of April, A. D. 1902.

[SEAL.]

EDW. L. PAYNE,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) No. 1018 In the circuit court of the United States, ninth circuit, southern district of California. Pacific Electric Railway Company, a corporation, plaintiff *vs.* City of Los Angeles *et al.*, defendants Demurrer Original Service of the within — is hereby admitted this — day of —— 190– Bicknell Gibson & Trask attorney- for — Filed Apr. 24, 1902 Wm. M. Van Dyke, clerk E. E. Millikin attorney for — 438–439 Bradbury block, Los Angeles, California.

53 At a stated term, to wit, the July term, A. D. 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, south-

ern division, held at the court-room in the city of Los Angeles on Saturday the first day of November, in the year of our Lord one thousand nine hundred and two:

Present: The Honorable Olin Wellborn, district judge.

PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants. } No. 1018.

This cause having heretofore been submitted to the court for its consideration and decision upon complainant's application for a preliminary injunction, and the court having duly considered the same and being fully advised in the premises, it is now on this 1st day of November, 1902, being a day in the July term, A. D., 1902 of said circuit court of the United States for the southern district of California, ordered that said motion for an injunction be, and the same hereby is denied, and counsel for all of the parties to the said cause being now present in open court, with their consent and on their motion it is ordered that the demurrer of the defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles, and M. P. Snyder, mayor of the city of Los Angeles, to the bill of complaint, and the demurrer of defendants Los Angeles Traction Company, Wm. S. Hook and E. A. Davis, to the bill of complaint be, and the said demurrers hereby are now submitted to the court for its consideration and decision; whereupon, it is
54 ordered that said demurrers be, and the same hereby are sustained, and counsel for complainant having stated that complainant does not desire time in which to amend its bill of complaint, it is now ordered that said bill of complaint be dismissed for want of equity to which ruling of the court complainant by its counsel notes and is allowed an exception, which is hereby entered herein.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States, for the southern district of California, do hereby certify the foregoing to be a full, true and correct copy of an original order denying application for injunction, sustaining demurrers and dismissing the bill of complaint, made and entered by said court November 1st, 1902, in the cause entitled Pacific Electric Railway Company, a corporation, complainant, *vs.* The City of Los Angeles, *et al.*, defendants, No. 1018, southern division, and remaining of record therein.

Attest my hand and the seal of said circuit court, this 1st day of November, A. D. 1902.

WM. M. VAN DYKE, *Clerk.*
[SEAL.] CHAS. N. WILLIAMS,
Deputy Clerk.

(Endorsed:) No. 1018 U. S. circuit court ninth circuit, southern district of California. Pacific Electric Railway Company, *vs.* The

City of Los Angeles, *et al.* Certified copy order denying application for preliminary injunction, sustaining demurrers and dismissing bill. Filed Nov. 1 1902 Wm. M. Van Dyke. clerk Chas. N. Williams deputy.

55 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants. } No. 1018.

The complainant filed its bill of complaint herein on the 8th day of March, 1902, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon on said 8th day of March, 1902, issued, returnable on the 7th day of April, 1902, which is hereto annexed.

On the 7th day of April, 1902, the defendants The City of Los Angeles and the Members of the Council of the City of Los Angeles, appeared herein by W. B. Mathews, Esq., their solicitor.

On the 7th day of April, 1902, the defendants The Los Angeles Traction Company, William S. Hook and E. A. Davis, appeared herein by E. E. Millikin, Esq., Messrs. Gibbon, Thomas & Halsted, their solicitors and P. R. Wilson, Esq., and Messrs. Camp & Lissner their counsel.

56 On the 24th day of April, 1902, the defendants The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles, M. P. Snyder, mayor of the city of Los Angeles, filed herein their demurrer to the bill of complaint, which is hereto annexed.

On the 24th day of April, 1902, the defendants Los Angeles Traction Company, William S. Hook and E. A. Davis filed herein their demurrer to the bill of complaint, which is hereto annexed.

On the 1st day of November, 1902, the court made and entered herein an order denying the application for a preliminary injunction and sustaining the demurrer of the defendants The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles, to the bill of complaint, and the demurrer of defendants Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, to the bill of complaint, and dismissing said bill of complaint, a copy of which order is hereto annexed.

On the 1st day of November, 1902, a final decree in accordance with said order was signed, filed, entered and recorded herein and is hereto annexed.

57 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant, *vs.* THE CITY OF LOS ANGELES, P. W. POWERS, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants.	In Equity. No. 1018. Decree.

The court having on this 1st day of November, 1902, being a day in the July term, A. D., 1902, of said circuit court of the United States for the southern district of California, ordered that the demurrer of the defendants The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles, M. P. Snyder, mayor of the city of Los Angeles, and the demurrer of The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, to the bill of complaint be sustained, and that said bill of complaint be dismissed for want of equity,

Now, therefore, it is ordered, adjudged and decreed that complainant's said bill of complaint be, and the same hereby is dismissed for want of equity, and that defendants have and recover of and from complainant their costs in this behalf taxed at $—

58 Los Angeles, California, November 1st, 1902.

OLIN WELLBORN, *Judge.*

Decree entered and recorded November 1st, 1902.

WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 1018 U. S. circuit court ninth circuit, southern district of California. Southern division. Pacific Electric Railway Company, *vs.* The City of Los Angeles, *et al.*, Decree Filed Nov. 1 1902 Wm. M. Van Dyke clerk —— —— deputy.

59 Whereupon, said bill of complaint, subpœna, demurrer of defendants The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd and E. L. Blanchard, composing the council of the city of Los Angeles, M. P. Snyder, mayor of the

city of Los Angeles, demurrer of defendants Los Angeles Traction Company, William S. Hook and E. A. Davis, copy of order sustaining demurrers and dismissing the bill of complaint and said final decree are hereto annexed, said final decree being duly signed, filed and enrolled pursuant to the practice of said circuit court.

Attest, etc.,

[SEAL.]

WM. M. VAN DYKE, *Clerk.*
CHAS. N. WILLIAMS,
Deputy Clerk.

(Endorsed:) No. 1018 In the circuit court of the United States ninth judicial circuit, for the southern district of California. southern division. Pacific Electric Railway Company, *vs.* The City of Los Angeles, *et al.*, Enrolled papers Filed November 1st 1902. Wm. M. Van Dyke, clerk. By Chas. N. Williams deputy clerk. Recorded Decree Register Book No. 3 page 8.

60 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants. } No. 1018.

Opinion of the Court on Motion for Injunction and Demurrer to Bill.

Complainant brings this suit against The City of Los Angeles and other defendants to obtain a decree establishing complainant's ownership of the street railway franchise described in the bill, to vacate and set aside certain orders or resolutions of the city council of Los Angeles purporting to divest complainant of said franchise, and to enjoin any interference by defendants with the construction and operation of the railway authorized by said franchise.

The matters alleged in the bill are these:

Complainant and The City of Los Angeles, one of the defendants, are California corporations, the latter being a municipal corporation, under a freeholders' charter. Statutes of California, 1889, page 656. The other defendants are also citizens of said State, except The Los Angeles Traction Company, which is a corporation organized under the laws of the State of Illinois.

61 The legislature of the State of California, at its session held in the year 1901, passed an act entitled "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," which act became a law of said State on the 11th day of March, 1901, and is in the words and figures following:

"SECTION 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying

gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town within this State, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"SEC. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the municipality an application, and thereupon said governing body shall, in its discretion, and when the application is accompanied with a petition praying that the same be granted, signed by the owners of three-fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, must advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a
62 day for ten successive days, if it be a daily newspaper, and if there be no daily paper published in such city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty (20) nor more than thirty (30) days before any further action can be taken thereon.

"SEC. 3. The publication must state the character of the franchise or privilege to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent. (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; *provided further*, that if the franchise be a renewal of a right already in existence, the payment of said percentage of gross receipts shall begin at once.

"SEC. 4. In case the franchise granted shall be an extension of an existing system of street railroad then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be exclusive as to the amount of the gross receipts of said extension.

"SEC. 5. Said advertisement shall also contain a statement that the said franchise will be granted to the person, firm or corpora-
63 tion who shall make the highest cash bid therefor; *provided only*, that at the time of the opening of said bids any respon-

sible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent. by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor.

"SEC. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power to erect poles or wires for transmitting heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within said time said franchise so granted shall be declared forfeited, and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; *provided*, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months,

"SEC. 7. The grantee of every franchise or privilege granted under this act shall file a bond running to said city and county, city or town, with at least two good and sufficient sureties to be ap-
64 proved by such governing body, in a penal sum by it to be prescribed and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfil, and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and in case said bond shall not be so filed, the award of such franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of said governing body.

"SEC. 8. It shall be the duty of the attorney general, upon the complaint of any municipality, or, in his discretion, upon the complaint of any tax-payer, to sue for the forfeiture of any franchise granted under the terms of this act, for the non-compliance with any condition thereof.

"SEC. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one

person, firm or corporation, as against another, in bidding for the purchase thereof.

"SEC. 10. Any member of any common council or other governing or legislative body of any city and county, city or town of this State, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

"SEC. 11. All acts or parts of acts in conflict herewith are hereby repealed; *provided, however*, that nothing herein contained
65 shall be construed as repealing or amending the following acts, to wit: 'An act relating to the granting by the counties and municipalities of franchises for the construction of paths and roads for the use of bicycles and other horseless vehicles,' approved March twenty-seventh, eighteen hundred and ninety-seven; 'An act to authorize cities and towns to grant franchises for the construction and maintenance of railroads beyond the limits of such cities or towns leading to public parks owned thereby,' being chapter forty of the laws of eighteen hundred and ninety-seven of the State of California.

"This act shall take effect immediately." (Statutes of California, extra session, Thirty-third Legislature, 1900, page 265.)

Complainant under and pursuant to said act, on the 25th day of November, 1901, presented to the governing body, to wit, the council of the city of Los Angeles, its application for an electric street railway franchise upon certain streets of said city.

Said council, on January the 6th, 1902, adopted and caused to be published, as provided in said act, a "notice of sale of a street railroad franchise," which notice defines the route of said proposed road, the terms and conditions upon which the franchise will be offered for sale and granted, and concludes as follows:

"Notice is also hereby given that sealed bids in writing will be received for the said franchise up to 11 o'clock in the forenoon of the 10th day of February, 1902; that the bids received will be opened at that time; that all bids must be for the payment of a stated sum in gold coin of the United States; and that said franchise will be granted to the person, firm or corporation who shall make the highest
66 cash bid therefor; provided only, that at the time of opening said bids any responsible firm, or corporation, present or represented, may bid for said franchise a sum not less than ten per cent. above the highest sealed bid therefor, and said bid so made may be raised ten per cent. by any responsible bidder present, and said franchise will finally be struck off, sold and granted by said city council to the highest bidder therefor in gold coin of the United States, and said successful bidder will be required to deposit with said city council, or such person as it may direct, the full amount of his or its bid within twenty-four hours thereafter, and in case he or it shall fail to do so, then the said franchise shall be granted to the next highest bidder therefor, and that the city council reserves the

right to reject any and all bids, provided, that no bid, whether sealed or otherwise, shall be received or considered unless the same be in writing and subscribed by a responsible bidder, or by his or its duly authorized agent."

On the day named in the notice, at 11 o'clock, a. m., the sealed bids were opened and found to be as follows: one by complainant of $25,000, and one by the defendant William S. Hook of $37,500, one by the defendant E. A. Davis of $139,000 and one by E. Murray of $415,000.

There being no bid of ten per cent. upon the amount bid by said Murray, said council, on the same day, accepted the bid of said Murray, and ordered, that the said franchise be struck off, sold and granted to him, and, that the city treasurer be authorized and directed to receive the money to be paid for such franchise by said Murray, and ordered and declared, that the period of twenty-four hours within which the said Murray is allowed to pay for the said franchise should expire at 3.15 o'clock, p. m., of February the 11th, 1902.

The three bids other than complainant's were made in the interest of the defendant corporation The Los Angeles Traction Com-
67 pany, and with the fraudulent intent to prevent competition in the bidding before the council, and the bid of $415,000 was made at the suggestion and for the benefit of said Los Angeles Traction Company, and with the fraudulent intent to prevent any further bidding when the sealed bids were opened.

The said Murray is not a person of any financial standing, and was not, at the time said bid was made, nor has he been at any time since, worth $1000, and could not, either from funds or credit of his own, have paid, nor did he ever intend to pay the said sum of $415,000, or any part thereof, and all of these matters were known by the said Los Angeles Traction Company, said E. A. Davis and said William S. Hook.

Said Murray did not pay the $415,000 within twenty-four hours, and never offered to pay said, or any sum at any time, and never appeared before said council on the 11th day of February, 1902, or at any other time.

The said Davis and the said Hook, agents of said traction company, appeared before said council on said 11th day of February, 1902, and when said twenty-four hours expired, and in pursuance of the fraudulent scheme to prevent competition in bidding, claimed, that said council had no power, under said act, to do anything or take any proceedings looking to the sale of said franchise, other than to accept the bid next highest to that of said Murray, namely, the bid of said Davis for the sum of $139,000, and to sell and grant to said Davis said franchise, and demanded, that said franchise be awarded to said Davis, under said bid, and for the benefit of said Los Angeles Traction Company, and tendered to said council the amount of the bid of said Davis, to wit: $139,000, gold coin, but which tender was refused by said council. Said Davis throughout said proceedings was acting for and on behalf of and in the interest

of said Los Angeles Traction Company, and sought to obtain
68 the grant of said franchise to himself, but for the benefit of said company. Said Davis and Hook and said traction company did then, and do now claim an interest in said franchise, and claim, that said Davis is the owner thereof, and make said claim adversely to complainant, which claim is without any foundation whatever, and said parties, nor either of them, has any right, title or interest in said franchise.

On the 11th day of February, 1902, and prior to the expiration of the said twenty-four hours, complainant, being previously apprised of the fact, that the bid of said Murray was a fraudulent contrivance of said traction company, William S. Hook and E. A. Davis to prevent further bidding, and knowing that said Murray would not appear within the twenty-four hours and pay said bid, or any part thereof, presented in writing a bid of $152,900 for said franchise, being ten per cent. over and above the bid of said Davis, and, when said twenty-four hours had expired, offered said sum to said council.

Upon the presentation by complainant of said bid of $152,900, said council called before them the city treasurer, who informed said council, that there had been no payment on Murray's bid, and thereupon said council, by a vote of seven of its members for and two against, passed a motion declaring said Murray a fraudulent and irresponsible bidder.

After said motion was passed, complainant bid for said franchise, the same described in said notice of sale, the sum of $152,900, and at the time presented to said council a certificate of deposit, drawn on the Farmers' and Merchants' Bank of Los Angeles, payable to said city, for said sum of $152,900.

Thereupon, and at the same meeting, the president of the council called for bids to purchase said franchise, above the one so made by complainant, but no other bid was received or offered, and thereupon said council ordered, that said street railway franchise
69 be struck off, sold and granted to complainant for said sum of $152,900, and, that said treasurer be authorized and directed to receive said purchase-money.

Pursuant to said order, said sum of $152,900 was paid by complainant to the treasurer of said city in gold coin of the United States for said franchise, and was accepted by said treasurer and said council, and immediately thereupon complainant delivered its bond, with two sureties, for $25,000, conditioned for the faithful performance of the terms of said street railway franchise, and otherwise in conformity with the act of the legislature of said State, to said council, and thereupon said council approved said bond, and caused the same to be filed in the office of the city clerk of said city.

After complainant paid said sum of $152,900 to said city treasurer, and executed and delivered its said bond to said city council, and after said council had struck off, sold and granted to complainant said franchise, and the same had vested and accrued, said council passed an ordinance granting said rights, privileges and franchise to complainant, and presented the ordinance to M. P. Snyder as

mayor of said city, and said Snyder afterwards, and about the 21st day of February, 1902, returned said ordinance without having affixed his signature thereto or approved the same, and with his objections to said ordinance, and thereafter, to wit, on the 21st day of February, 1902, said council, by reason of said mayor's disapproval of said ordinance, adopted a motion, that said ordinance be reconsidered, and upon the vote being again taken upon the passage of said ordinance, notwithstanding the mayor's veto, said council voted against the passage of said ordinance.

Thereupon, and on the same day, said council passed a resolution pretending and purporting to order any and all bids for said electric street railway franchise, including the bid made by com-
70 plainant, to be rejected, and directing and authorizing said treasurer of said city to refund to complainant said sum of $152,900, and ordering said city clerk to return said bond, executed as hereinbefore stated. The said clerk, acting under said instructions, offered to return said sum of money and said bond to complainant, but complainant refused to accept either said money or bond, denying the right of said council to annul or in any manner affect the franchise it claimed to have acquired under and by virtue of the proceedings already set forth.

At the same session of said council, a motion was carried, that the applications of complainant for franchises over certain streets in said city be referred to the board of public works, and, that said board redraft notice of sale of the same, and, that among said applications referred to in said motion was included the said application, upon which the above alleged sale was made to complainant.

Said council threatens to, and will, unless restrained by this court, offer said franchise, rights and privileges for sale and will, if any bids are made therefor, sell or attempt to sell the same, and grant or attempt to grant the same rights, privileges and franchise to any person making the highest bid therefor at said sale.

Said council, and other public authorities, threaten and intend to prevent complainant from constructing said street railway on any street in said city, and will, unless restrained by this court, forcibly prevent complainant from so doing; and on the 26th day of February, 1902, said council passed an order instructing the mayor, the street superintendent, or the chief of police to stop and prevent any attempt complainant might make to construct any street railway on any of said streets, with all the force at their command.

The matter in dispute exceeds, exclusive of interest and costs, the value of two thousand dollars, and is of a value not
71 less than $152,900.

Several affidavits have been filed by the parties, respectively, but they do not set up any additional facts which materially affect the legal aspects of the case.

Two demurrers have been interposed, one jointly by all the defendants except The Los Angeles Traction Company, William S. Hook and E. A. Davis, and the other by the last three defendants.

For causes both demurrers allege want of jurisdiction and equity, and one of them also alleges uncertainty in the bill.

On the question of jurisdiction complainant contends, that the proceedings set forth touching the street railway franchise in question, up to and including the acceptance, approval and filing of the bond required by the statute, constituted a complete and valid contract between said city and complainant, and vested in the latter said franchise, and that the resolutions or orders of said council, and the other proceedings taken and threatened for the purpose of vacating and setting aside said contract, are within the prohibitions of section 10, article 1 of the Constitution of the United States, and section 1 of the 14th amendment to said Constitution.

The writer of this opinion has recently, Nov. 1st, 1902, decided a case, in this court, Riverside and Arlington Railway Co. *v.* City of Riverside, — Fed. Rep. —, whose jurisdictional features bear such close resemblance to those here presented, that the opinion in that case may be fittingly adopted in this, and, for the reason and upon the authorities there given and cited, complainant's contention here as to a Federal question is sustained.

Coming now to the other cause of demurrer, want of equity in the bill, the next question to be considered is whether or not there was a valid grant to complainant of the street railway franchise in question.

72 On this branch of the case, complainant, at pages 156 and 183 of its brief, filed June the 10th, 1902, states its contention thus:

"The power to grant this franchise comes from the act of 1901.

* * * * * * *

"We next contend, that the question whether the plaintiff has the rights which it here claims is dependent upon the statute of 1901, and not any other authority whatever, and that under that act there was a complete grant."

Defendant's objections to the validity of said alleged grant may be generalized under two heads: First, that, in the proceedings had by the city council of Los Angeles for the sale of said franchise, certain requirements of said act of 1901 were not complied with, and, therefore, there was no valid grant; second, that said act of 1901 is void, because it undertakes to delegate municipal functions to a special commission, in violation of article 11, section 13 of the constitution of California, and, furthermore, said act, if constitutional, does not apply to the city of Los Angeles, because it concerns only municipal affairs, and, as to such affairs, said city, by article 11, section 6 of the constitution of California, as amended in 1896, is exempt from the operation of general laws, and subject only to its charter, whose provisions require, for granting a franchise, the conjoint action, by an ordinance, of council and mayor.

Either of these objections, if good, is fatal to the alleged grant, and I proceed at once to the consideration of the first.

In determining whether or not the council, in its proceedings for the disposition of said franchise, lawfully complied with the requirements of said act of 1901, the rule that mode is the measure

73 of power, and aside from the designated mode there is no power, should be carefully observed. Fort Scott *v.* Eads

Brokerage Co., 117 Fed. Rep. 51 (advance sheets); Board *v.* Templeton, 51 Ind. 266; Woodruff *v.* Berry, 40 Ark. 253; Saddler *v.* Eureka, 15 Nev. 39; State *v.* Cornell, 52 Neb. 25, 71 N. W. Rep. 961; Webster *v.* French, 12 Ill. 302; Zottman *v.* San Francisco, 20 Cal. 97; McCracken *v.* San Francisco, 16 Cal. 620; Heidelburg *v.* St. Francois County, 100 Mo. 69 12 S. W. Rep. 914.

It should also be borne in mind, that negative words in a statute show an intent to make its provisions imperative, and require strict performance, both as to time and manner, since section 1 of said act provides, that "Every franchise * * * to construct or operate street railroads * * * shall be granted upon the conditions in this act provided, and not otherwise" (23 Amer. & Eng. Ency. of Law, 1st ed., 455; Koch *v.* Bridges, 45 Miss. 247; Hurford *v.* City of Omaha, 4 Neb. 336; Cooley's Constitutional Limitations, 6th ed., 89).

In the present case, additional energy is imparted to the rules of construction above stated by sec. 10 of said act of 1901, which is as follows:

"Any member of any common council or other governing or legislative body of any city and county, city or town of this State, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction."

I come now directly to the inquiry, whether or not the proceedings of the council conformed, in all essentials, to the requirements of said act of 1901.

Defendants, among other alleged illegalities, contend, that the award of the franchise to complainant, on its bid of $152,900, after Murray's default, was a fatal departure from that part of sec-
74 tion 5 of said act of 1901, which provides, "that at the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent. by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor."

The precise question here presented is this: When must the competition subsequent to sealed bids, for which said section provides, take place? To this question, the first clause of the foregoing extract from the section makes answer as follows: "At the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid

therefor, and said bid, so made, may be raised ten per cent. by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States." This clause does not confine the subsequent competition to the precise moment of opening the sealed bids, but it does make it the next step in the series of steps prescribed by said section, and thus requires it to take place before the franchise has been struck off to the highest bidder. Said clause certainly does not contemplate, that bidding shall continue after the franchise has been struck off. With that construction the clause would be meaningless.

75 Again, the last clause of said section, which, referring to default of the successful bidder in the matter of the deposit required of him, is as follows: "And in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor," forbids, by unavoidable implication, the idea, that there can be any competition after such default. It will be observed, that the words "struck off, sold and," used in a previous clause of the section, are omitted from the last clause. These words "struck off" and "sold," which are ordinarily employed, and particularly appropriate to designate the closing of a public sale to the highest bidder, such as that provided for by the clause where these words appear, would have been out of place in, and hence were designedly omitted from said last clause, for the reason, that it provides for a contingency, namely, the failure of the successful bidder to deposit the amount of his bid, which can only arise after the bidding has been closed. When the bidding has been closed and the successful bidder declared, or, in other words, when the property has been "struck off" and "sold," the next and last thing to be done is a formal transfer of ownership, by such means as are suited to the particular case, and this final act is fully and accurately prescribed in said last clause, by the use of the word "granted." Under said clause there is to be no striking off, no selling; those stages of competition have been passed; the only act to be performed is that of granting.

Complainant's construction of said clause, namely: "The meaning fairly is nothing more nor less than this—that it should be struck off to him who next bids the highest therefor," is, to my mind, wholly inadmissible and must be rejected. It is inconsistent, as I have just shown, with the peculiar phraseology of the clause, and as appears below, does violence to the general plan of the section. If

76 the legislature had intended that there should be further competition after default of the successful bidder, it would have chosen apt words to express the intention, rather than language which implies the contrary, and, besides, would have prescribed fully the nature and duration of the subsequent competition, that is, whether it was to be by sealed or open bids, and when it was to close.

The various steps, for which the section provides, consecutively arranged, are these: First, opening of the sealed bids; second, oppor-

tunity for further competition, in the manner and upon the terms prescribed in the section; third, striking off of the franchise to the highest bidder; fourth, allowance of twenty-four hours to the successful bidder to deposit the amount of his bid; and, fifth, in case said bidder fails to make the deposit, grant of the franchise to the next highest bidder therefor. I do not mean, that each step after the first must follow immediately, in point of time, its nearest antecedent, but, that nothing affecting the result of the competition can intervene between any two of said steps. Exigencies may arise, at any stage of the proceedings, to justify a postponement or adjournment of the whole matter, but whenever its consideration is resumed, the order of progression I have indicated must be adhered to.

In the case at bar, therefore, when the sealed bids were opened, and no bid of ten per cent. above the amount bid by Murray was then made, the action of the council in striking the franchise off to him, and fixing the time at which the twenty-four hours allowed by law for depositing the amount of his bid would expire, namely, 3.15 o'clock, p. m., of February the 11th, 1902, was regular.

When the time thus fixed had expired, and Murray had failed to make the required deposit, the action that should have been next taken is prescribed in the last clause of said section
77 already partially considered, which provides, that, if the successful bidder fails to make the deposit required of him, "the franchise shall be granted to the next highest bidder therefor." When, speaking concretely, the contingency referred to in said clause, namely, Murray's failure to deposit the amount of his bid, occurred, in the afternoon of February the 11th, 1902, it was then the duty of the council to grant the franchise to the next highest bidder, unless there was some sufficient reason for a refusal. This qualification of the council's duty I make because of the charge in the bill, that the next highest bid was fraudulent. Assuming the truth of this charge, which must be done on demurrer, the council ought not to have granted the franchise to said bidder. When it refused to do so, however, its power in the premises was exhausted, because said act of 1901 makes no provision for any subsequent proceeding, and the alleged grant of the franchise thereafter to complainant was without authority and void. The only way said franchise could have been lawfully granted after its refusal to the next highest bidder was under and pursuant to a new advertis-ment.

Complainant's argument, that this construction of said act impairs its efficiency by enabling designing and unscrupulous persons to defeat the disposition of any franchise offered for sale under said act, if not without force, can but be deemed inconclusive, for the rule is well settled, that the language of a statute, when plain and unequivocal, determines its meaning, regardless of consequences. (Bartlett *v.* Morris, 9 Porter, Ala., 268; 4 Bacon's Abridgement 652; Coffin *v.* Rich, 71 Amer. Dec. 563.)

The truth is, said act of 1901 never contemplated the scandalous frauds here charged, without denial, against some of the defendants, and, hence, it may be, no adequate safeg*au*rds against them were

erected. This defect in the law, however, if it exists, is an omission to be supplied by the legislature, not by the courts.

78 The declaration of the council, made after Murray's default, that he was a fraudulent and irresponsible bidder, and, that his bid was null and void, is an immaterial circumstance. If such an enquiry was authorized, it must have preceded the order striking off the franchise to Murray, since said order necessarily determined the lawfulness of his bid, and there was no power in the council to review said order. (Belser *v.* Hoffschneider, 104 Cal. 455.) After the franchise had been struck off, all the council could lawfully do, under the pending advertisement, was to allow Murray twenty-four hours to make the deposit, and, if he failed to do so, grant, or, on sufficient grounds, refuse to grant the franchise to the next highest bidder.

For the reasons above given, I am of opinion, that the complainant has not acquired the franchise it here claims, nor has it any valid contract with the city in relation thereto.

This conclusion renders it unnecessary for me to pass upon the other questions, which have been argued by counsel, and are outlined in an earlier part of this opinion.

The motion for injunction will be denied.

OLIN WELLBORN, *Judge.*

(Endorsed:) No. 1018 U. S. circuit court, southern district of California. Southern division. Pacific Electric Company, a corporation, *vs.* The City of Los Angeles, *et al.* Opinion of the court on motion for injunction and demurrer to bill. Filed Nov. 1 1902 Wm. M. Van Dyke clerk.

79 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, George P. McLain, Frank Walker, William M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, William S. Hook, and E. A. Davis, Defendants.

The above-named complainant, The Pacific Electric Railway Company, considering itself aggrieved by the order and decree of said court entered on the 1st day of November, 1902, sustaining the demurrers of the defendants to the complainant's bill of complaint and dismissing the complainant's said bill, hereby appeals from said order and decree to the Supreme Court of the United States, and it prays that its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree

was made, duly authenticated, may be sent to the Supreme Court of the United States.

J. S. CHAPMAN,
BICKNELL, GIBSON & TRASK,
WORKS & LEE,
HUNSAKER & BRITT,
W. F. FITZGERALD,
DUNN & CRUTCHER,
Solicitors for Complainant and Appellant.

And now, to wit, on the 1st day of Dec., 1902, it is ordered
80 in open court that the appeal be allowed as prayed for.
OLIN WELLBORN, *Judge.*

(Endorsed:) Original: No. 1018. U. S. circuit court, ninth circuit, southern district of California, southern division. Pacific Electric R'y Co., complainant, *vs.* The City of Los Angeles, *et al.*, defendants. Appeal. Filed Dec. 1 1902 Wm. M. Van Dyke, clerk. Works & Lee, *et al.*, rooms 420 to 425 Henne building, Los Angeles, Cal. solicitors for complainant.

81 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant, *vs.* THE CITY OF LOS ANGELES, P. W. POWERS, W. H. Pierce, George P. McLain, Frank Walker, William M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, William S. Hook, and A. E. Davis, Defendants.	Assignment of Errors.

Now comes the above-named appellant, The Pacific Electric Railway Company, by J. S. Chapman, Bicknell, Gibson & Trask, Works & Lee, Hunsaker & Britt, W. F. Fitzgerald and Dunn & Crutcher, its counsel, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That the said circuit court erred in sustaining the demurrer of the defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, William M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd and E. L. Blanchard, composing the council of the city of Los Angeles, and M. P. Snyder, mayor of the city of Los Angeles, to the complainant's bill of complaint.

2. That said court erred in sustaining the demurrer of the defendant-, The Los Angeles Traction Company, William S. Hook, and E. A. Davis, to the complainant's bill of complaint.

3. Said court erred in holding that the complainant was not the owner of and had not acquired the franchise and privilege to construct and operate a street railway in the city of Los
82 Angeles, as alleged in the complainant's bill of complaint.

4. The said court erred in holding that complainant had not a valid contract with the city of Los Angeles entitling it to exercise the privileges and franchise to construct and operate a street railway in said city of Los Angeles, as alleged in the complainant's bill of complaint.

5. The said court erred in holding and deciding that the proceedings of the defendants, The City of Los Angeles and the said council of said city for the sale of the said franchises and privileges set forth and described in the complaint, including the striking off and granting the same to the plaintiff, and the payment of the purchase price therefor, and the execution of the said bond, did not vest the title to the said franchises and privileges in the said plaintiff.

6. The said court erred in holding and deciding that the proceedings of said defendants taken subsequently to the striking off, granting and selling the said franchises and privileges described in the complainant's bill of complaint to the plaintiff, and the payments of the purchase price thereof, and the acceptance of the same, and the execution of the bond, and the approval thereof, did not deprive the plaintiff of its said property so purchased without due process of law, in violation of the Constitution of the United States as alleged in the complainant's bill of complaint.

7. The said court erred in holding and deciding that the defendant, The City of Los Angeles, did not, as alleged in the complainant's bill of complaint, impair the obligation of the contract to construct and operate a street railway in the city of Los Angeles in violation of the Constitution of the United States, as alleged in the complainant's bill of complaint.

8. The said court erred in holding and deciding that the defendant, The City of Los Angeles, did not take the property of the complainant, to wit: the franchise and right to construct and
83 operate a street railway in the city of Los Angeles, as alleged in the complainant's bill of complaint, without due or any compensation, in violation of the Constitution of the United States.

9. The said court erred in dismissing the complainant's bill of complaint.

10. The said court erred in decreeing that the defendants have and recover of and from the complainant their costs and disbursements in this cause laid out and expended.

Wherefore, the said Pacific Electric Railway Company prays that the decree and order of the said circuit court of the United States, ninth circuit, southern district of California, southern division, be reversed.

J. S. CHAPMAN,
BICKNELL, GIBSON & TRASK,
WORKS & LEE,
HUNSAKER & BRITT,
W. F. FITZGERALD,
DUNN & CRUTCHER,
Counsel for Appellant.

(Endorsed:) Original. No. 1018. U. S. circuit court, ninth circuit, southern district of California, southern division. Pacific Electric R'y Co., complainant, *vs.* The City of Los Angeles, *et al.*, defendants. Assignment of errors. Filed Dec. 1 1902 Wm. M. Van Dyke, clerk Works & Lee, *et al.*, rooms 420 to 425 Henne building, Los Angeles, Cal. solicitors for complainant.

84 At a stated term, to wit, the July term, A. D., 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, southern division, held at the court-room in the city of Los Angeles, on Monday, the first day of December, in the year of our Lord, one thousand nine hundred and two:

Present: The Honorable Olin Wellborn, district judge.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, George P. McLain, Frank Walker, William M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, William S. Hook, and E. A. Davis, Defendants. } No. 1018.

On motion of W. J. Trask, Esq., of counsel for complainant, it is ordered that the appeal of said Pacific Electric Railway Company, complainant, from the order and decree of said court, entered on the 1st day of November, 1902, sustaining the demurrers of the defendants to complainant's bill of complaint, and dismissing the complainant's said bill, to the Supreme Court of the United States be, and the same hereby is allowed, and that a transcript of the record, and proceedings and papers upon which said order and decree were made duly authenticated be sent to the Supreme Court of the United States. It is further ordered that the bond on appeal in the sum of five hundred (500) dollars tendered by said
85 appellant, The Pacific Electric Railway Company, be, and the same hereby is approved.

86 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, GEORGE P. McLain, Frank Walker, William M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, William S. Hook, and E. A. Davis, Defendants.

Know all men by these presents that we, The Pacific Electric Railway Company, as principal, and —— —— of the city of Los Angeles,

State of California, as surety, are held and firmly bound unto the above-named defendants, The City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, William M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, composing the council of the city of Los Angeles, M. P. Snyder, mayor of the city of Los Angeles, The Los Angeles Traction Company, William S. Hook and E. A. Davis, in the penal sum of five hundred dollars ($500.00) to be paid to the said parties, for the payment of which well and truly to be made we bind ourselves, and each of us, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of November, in the year of our Lord, 1902.

Whereas, the above-named Pacific Electric Railway Company has prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree rendered in the above-entitled
87 suit by the judge of the circuit court of the United States for the ninth circuit, southern district of California;

Now, therefore, the condition of this obligation is such that if the above-named Pacific Electric Railway Company shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force.

PACIFIC ELECTRIC RAILWAY COMPANY,
By EPES RANDOLPH, *V. P. & G. M.*
E. C. MYERS.

Sealed and delivered and taken and acknowledged this 29th day of November, 1902, before me.

[SEAL.] R. W. DARBY,
Notary Public.

Approved.
OLIN WELLBORN, *Judge.*

(Endorsed:) Original. No. 1018. U. S. circuit court, ninth circuit, southern district of California. Southern division. Pacific Electric R'y Co., complainant, *vs.* The City of Los Angeles, *et al.*, defendants. Undertaking on appeal. Filed Dec. 1, 1902 Wm. M. Van Dyke, clerk. Works & Lee, *et al.* rooms 420 to 425 Henne building, Los Angeles, Cal. solicitors for complainant.

88 In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

PACIFIC ELECTRIC RAILWAY COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES, P. W. POWERS, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, Composing the Council of the City of Los Angeles; M. P. Snyder, Mayor of the City of Los Angeles; The Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis, Defendants. } No. 1018.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, do hereby certify the foregoing eighty-seven (87) typewritten pages, numbered from 1 to 87 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the record, pleadings, opinion of the court, assignment of errors and all proceedings and papers upon which the order and
89 decree of said court entered on the first day of November 1902 were made, and that the same together constitute the transcript of the record on appeal to the Supreme Court of the United States, in said cause.

I do further certify that the cost of the foregoing record is $42.80 the amount whereof has been paid me by The Pacific Electric Railway Company, the appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court of the United States of America, on the ninth judicial circuit, in and for the southern district of California, this 5th day of December, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

Seal U. S. Circuit Court, Southern Dist. Cal., 1886.

WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

Endorsed on cover: File No. 18,760. S. California C. C. U. S. Term No. 532. Pacific Electric Railway Company, appellant, *vs.* The City of Los Angeles, P. W. Powers, W. H. Pierce, *et al.* Filed December 24", 1902.

16353

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 532.

Pacific Electric Railway Company,
Appellant,

vs

The City of Los Angeles, P. W. Powers, W. H. Pierce et al.,
Appellees.

BRIEF ON BEHALF OF THE APPELLANT, THE PACIFIC ELECTRIC RAILWAY COMPANY.

Statement of the case.

I.

This cause was heard in the Circuit Court of the Ninth Circuit, Southern District of California, Southern Division, upon the bill filed by the appellant and the

demurrers filed thereto by the defendants, the appellees.

The suit was brought by the appellant against the City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, who composed the council of the city of Los Angeles, and M. P Snyder, the mayor of the city, and the Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis.

Two separate demurrers were filed, one on behalf of the city, the council and the mayor [Trans. pp. 30-31, fols. 47-48]; the other on behalf of the Los Angeles Traction Company, Wm. S. Hook and E. A. Davis [Trans. pp. 32-33, fols. 50-51].

The questions involved in the case arise out of the bill and the demurrers thereto, and the questions arising out of the demurrer filed on behalf of the city, its council and mayor, were:

1. That the court had no jurisdiction of the subject matter of the suit.

2. That the bill was without equity, and the plaintiff was not entitled to the relief prayed for against them.

3. That it was uncertain, in that it could not be determined from the bill what number of franchises was embraced in the notice of sale set forth in paragraph XII of the bill, and whether one or more than one, and that it could not be determined what number of franchises was offered for sale, sold or granted by the city council, whether one or more.

The questions raised by the demurrer of the Traction Company, Hook and Davis, were:

1. That the court had no jurisdiction.

2. Want of equity entitling the complainant to any relief against the defendants.

In the suit in the court below an application was made for a preliminary injunction, and divers affidavits were filed by the respective parties, but the appeal here is from the decree sustaining the demurrers and dismissing the bill.

The facts briefly stated, as set forth in the bill, after alleging the corporate character of the City of Los Angeles and the official character of its council and mayor, and the incorporation of the Los Angeles Traction Company, a corporation organized under the laws of the state of Illinois, and the citizenship of W. S Hook and E. A. Davis, are as follows:

In the month of March, 1901, the legislature of the state of California passed an act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises, with certain exceptions, which exceptions, however, do not relate to the franchises under consideration here. The entire act is set forth in the bill in paragraph VIII [Trans. pp. 2-5, fols. 4-8]. And in its main features it provides for the disposition of all franchises in any city and county, or city or town, within the state, with the exception of steam railroads and also excepting telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, which were to be granted

upon the conditions in the act provided, and not otherwise.

In the second section of the act, it is provided that an application for a franchise may be made and filed with the governing or legislative body of the municipality, and thereupon its governing body should, in its discretion, or if the application were accompanied with a petition praying that the same be granted signed by the owners of three-fourths of the frontage of the real property upon and along the route of the franchise applied for, they must advertise the fact of such application with a statement that it was proposed to grant the same, which advertisement should be in one or more newspapers of the city and county, and should state that bids would be received for such franchise, and that it would be awarded to the highest bidder, and prescribing the time of publication before any further action could be taken. It was required also by the act that the publication must state the character of the franchises or privilege proposed to be granted, the term, and if it were a street railroad, the route to be traversed, and must further state that sealed bids would be received up to a certain hour, and day, named, and the successful bidder and his assigns should, during the life of the franchise, pay to the municipality, two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded arising from its use, operation or possession.

An exception was here made that no percentage should be paid for the first five years, and thereafter should be payable annually, and if it were not paid

the franchise should be forfeited. But with the further provision that where the franchise was the renewal of a right already in existence, the payment of a percentage of the gross receipts should begin at once.

There were further provisions prescribing the manner in which these gross receipts should be estimated where the franchise was an extension of an existing system of street railroads. It was then further provided, in the 5th section of the act, that the advertisement should contain the statement that the franchise would be granted to the person, firm or corporation who should make the highest cash bid therefor, provided that, at the time of the opening of the bids, any responsible firm or corporation present or represented might bid for the franchise or privilege a sum not less than 10% above the highest sealed bid therefor, and that that bid might be raised 10% by any other responsible bidder present, and the franchise or privilege should finally be struck off, sold and granted by the said governing body to the highest bidder therefor, in gold coin of the United States, and this successful bidder was required to deposit with the governing body or such person as it might direct, the full amount of his or its said bid, within 24 hours thereafter, and if he or it failed to do so, then the franchise or privilege should be granted to the next highest bidder therefor.

Section 6 provided that when the franchise was granted, the work should be commenced in good faith within not more than four months from the granting of the franchise, and completed within not more than three years thereafter, and if not so completed the

franchise should be forfeited, with a provision for the extension of the time by the governing body, of not more than three months for good cause shown.

The seventh section required the grantee to file a bond running to the city in a penal sum to be prescribed by it, and set forth in the advertisement for bids, conditioned for the performance of the terms and conditions of the franchises. And if this bond were not filed within five days after the franchise was awarded, the award should be set aside and the same might be granted to the next *lowest bidder*, or again offered for sale, in the discretion of the said governing body.

The 8th section provided for suit by the attorney general to forfeit the franchise for the non-compliance with any condition thereof.

The 9th section prohibited this governing body from inserting any clause or condition in any franchise or grant offered or sold under the terms of the act which should, directly or indirectly, *restrict free and open competition and bidding therefor*, and no clause or provision should be inserted in any franchise offered for sale which should in any wise *favor one person, firm or corporation as against another in bidding for the purchase thereof*.

The 10th section made it a misdemeanor for any member of the council or governing body, by his vote, to violate or attempt to violate the provisions of the section, and subjected him to deprivation of his office if convicted of such an offense.

The 11th section repealed all acts or parts of acts in

conflict therewith, but limiting the repeal so as not to affect certain acts mentioned in the repealing clause, but not material to be considered here.

Under this act the appellant presented an application to the council for certain street railway franchises, and the council exercised its discretion, and did thereupon proceed to advertise the fact of the application, together with the statement that it was proposed to grant the same, and this advertisement did, in all respects, conform to the provision of the statute, and the notice of the sale of this franchise is set forth in full in the transcript of the record, paragraph XII, pages 6-13, fo's. 10-20.

In the notice, or advertisement, the time fixed for receiving sealed bids was the 10th of February, 1902, at 11 o'clock A. M., and prior to that time the appellant delivered a sealed bid to the council of the city of Los Angeles, which is its legislative or governing body, offering for the said franchise $25,000. Within the time prescribed, William S. Hook, who was the president of the Los Angeles Traction Company, delivered a sealed bid for $37,500. E. A. Davis presented a sealed bid offering to purchase the said franchise for $139,000. One E. Murray did also, within the proper time, present a sealed bid offering for the franchise advertised, $415,000. And these were the only bids presented to the council.

And on the 10th of February, 1902, they were opened, and no bid of 10% upon the amount bid by E. Murray was made by anybody, and thereupon the council accepted Murray's bid, and ordered the fran-

chise to be struck off, sold and granted to Murray, and directed the city treasurer to receive the money to be paid for such franchise by Murray, and also named the time when the 24 hours would expire in which the money was to be paid under the provisions of the statue, and which time was 3 o'clock and 15 minutes on February 11, 1902.

Now in fact the bids of Hook, Davis and Murray all proceeded from the same quarter. They were made on behalf of the Los Angeles Traction Company, and they were made with the fraudulent intent to prevent competition in the bidding before the council; this bid of Murray for the sum of $415,000 was put in at the suggestion and for the benefit of the Los Angeles Traction Company, the parties knowing that nobody would bid 10% on the bid of Murray, and that the franchise was not worth the sum of $415,000. Murray was not a person of any financial standing, and wasn't worth, at the time the bid was made, nor at any time afterwards, a thousand dollars, and could not, from his own funds or through any credit of his own, have paid, and he never intended to pay, the sum of $415,000, nor any part thereof, all of which was known and understood by the Los Angeles Traction Company, and Davis and Hook. And Murray didn't pay the sum of $415,000 within 24 hours, and never offered to pay that or any sum, and as a matter of fact he never appeared before the council on the 11th day of February, 1902, nor at any other time.

On the 11th day of February, 1902, the Los Angeles Traction Company, Davis and Hook, the agents of said

company, did appear before the said council, and when the 24 hours expired, in pursuance of the fraudulent scheme to prevent competition in the bidding, they claimed and pretended that the council had no power or authority under the act, to do any other thing, or take any other proceedings looking to the sale of the franchise except to accept the bid already put in next highest to that of Murray, towit, the bid of Davis for the sum of $139,000, which bid was also made on behalf of the Traction Company, and that it was the duty of the council then to sell and grant the franchise to Davis, and they demanded that the franchise be awarded to Davis on said bid and for the benefit of the Los Angeles Traction Company.

Before the 24 hours had expired the appellant became apprised of the fact that this bid of Murray was a fraud, and was a mere device to prevent competition in the bidding before the council, and that Murray was not going to appear within the 24 hours, and would not pay the said bid or any part thereof, and consequently the appellant appeared, by its authorized agents, before the council on the 11th day of February, 1902, and prior to the expiration of the 24 hours, did present, in writing, a bid of $152,900 for the franchise, being 10% over and above the bid of Davis, and when the 24 hours had expired it did offer to the council of the city the said sum of $152,900.

On the 11th day of February, and after the 24 hours had expired, and after the appellant had offered the bid of the $152,900 for the franchise, the council called before them the city treasurer, who informed them that the purchase money had not been paid by

Murray, and thereupon Mr. Blanchard, a member of the council, moved that Murray be declared a fraudulent and irresponsible bidder for the Electric Railway franchise for which he had presented his bids, and each of them, and that his said bids were null and void, which motion was seconded and was carried by the vote of 7 of the council. And after this proceeding, the matter of the sale of the street railway franchise over the route commencing at the intersection of 7th and Spring streets, and which is the one in controversy here, was taken up for consideration, and thereupon the appellant did bid for the franchise the sum of $152,900.

A word of explanation is necessary here to the understanding of some of these proceedings. There were several different franchises offered for sale, and the publication made, and the time for receiving the bids was set for the same time, and bids had been made upon each of these, and Murray himself was a bidder on each so that when Mr. Blanchard moved that his bids for the electric railway franchises which he had presented, and each of them, was null and void, he had reference to all of these several bids, including the bids for the franchises which are now here in controversy.

At the same time that the appellant made the bid, after the order declaring Murray a fraudulent and irresponsible bidder, it presented to the council a certificate of deposit drawn on the Farmers & Merchants Bank of Los Angeles, payable to the city of Los Angeles, for the sum of $152,900. Thereupon the pres-

ident of the council called for further bids for the purchase of the said franchise over and above the bid made by the appellant. But no other bids were made, and thereupon, on motion of Blanchard, seconded by Mr. Allen, another member of the council, the council ordered that the franchises over the said route be struck off, sold and granted to the complainant, the appellant here, for the said sum so bid, and that the treasurer was authorized and directed to receive the purchase money, and the order was made striking off, selling and granting to the appellant the said franchises described in the notice set forth in the bid, for the sum of $152,900, and in pursuance of this order the $152,900 was immediately paid to the treasurer of the city of Los Angeles in gold coin of the United States, and the money was accepted by the treasurer and by the council of the city. And thereupon and immediately the appellant as principal, with good and sufficient sureties, executed the bond to the city in the sum of $25,000, all as provided in the said statute, and the bond was executed and approved by the council and filed in the office of the city clerk. And the money having been paid and the bond approved, the council did then finally strike off, sell and grant the franchise to the complainant.

Davis and Hook did, at the same time, set up and claim that the said Davis had become entitled to the said franchise, and they tendered to the city the $139,000 in gold coin, the amount of his bid, but it was refused by the council. And Hook and Davis and the Traction Company do claim the franchise and ad-

versely to the complainant, which is the cause of their being made parties defendant in this suit.

The bill alleges that these claims of the defendants, Davis, Hook and the Los Angeles Traction Company, are without any foundation; that they have no right to the franchise, or the right to construct the street railroad or operate the same thereon, or to exercise any of the franchises struck off, sold and granted to the appellant. [Trans. p. 17, fol. 27, par. XXVII.]

After the money had been paid by the appellant and received by the city treasurer under the direction of the council, and after the bond had been executed, approved and filed, the council did then pass a more formal ordinance granting all these rights to the appellant, and they presented this ordinance to M. P. Snyder, the mayor of the city, and he, on the 21st day of February, 1902, returned the ordinance without having affixed his signature thereto, or approved the same, and with his objections to the said ordinance.

And thereafter, and on the 21st of February, 1902, the council, by reason of the mayor's disapproval of the ordinance, adopted a motion that the ordinance itself should be reconsidered, and upon vote being taken upon the passage of the ordinance, notwithstanding the mayor's veto, the council voted against the passage of the ordinance. And on the same day the council passed a resolution pretending and purporting to order any and all bids for the said electric street railway franchise in the city of Los Angeles in controversy here, and including the bid of

the appellant, should be rejected, and directing, or pretending to authorize the treasurer of the city to return the money and the bond.

These proceedings were taken under the assumption that an ordinance granting the franchise in addition to the order of the council finally striking off, selling and granting to the complainant the said franchise, should be passed, and that it was necessary that the mayor of the city should approve the said ordinance, or in case he objected to it, to return it with his disapproval and the reasons therefor, and that then the council should repass the ordinance by the vote required by the charter of the city in order to its taking effect. But it is alleged in the bill that under the statute of California set forth in the bill, neither the council of Los Angeles nor the mayor had any discretion as to, or in the disposition of the bid of the appellant for the property, but they were, by the operation of the act of the legislature, ordered to strike off, sell and grant the same to the appellant; that no ordinance was necessary to complete the grant, nor did the mayor of the city have authority to perform any function in, about, or concerning the sale of franchises, rights and privileges under that act, and had no power either to approve or disapprove any such sale. That the said pretended veto by the mayor was wholly void, and had no effect whatever upon the rights of the appellant, and it was further alleged that the title to the said franchise had fully vested in the appellant under the statute, and that there was no power or authority in either the mayor, or the council,

or in both, to in any manner affect the rights which had accrued to the appellant.

Trans. pp. 17-18, par XXVIII, fols 27-29.

And the bill proceeds to allege that at the same session it was moved by the members of the council that the application of the appellant for the franchise over these streets should be referred to the board of public works, and that that board should redraft a notice of the sale of the same, which motion was carried, and that among the applications so referred was the one which had been purchased by the appellant here, and paid for as hereinbefore stated. And it was further alleged by the appellant that it had become vested with the title of the franchise, was the absolute owner of the same as granted to it, and that the resolutions and orders of the council pretending to reconsider the vote, or re-advertising the application of the appellant for the purchase of the franchise, and all other proceedings looking to the vacating and setting aside the grant, so made to the appellant, had been made and taken without any authority, and with the intent to deprive the appellant of its property without due process of law, and in violation of the constitution of the United States prohibiting any state from depriving any person of life, liberty or property without due process of law.

Trans. par. XXX, p. 19, fol 29.

This was followed by allegations repeating some of the obligations imposed upon the appellant by the statute under which the purchase was made, namely, that it must commence work within four months, and

complete it within three years. That it was desirous of performing the conditions of the said grant and preserving its property rights in the said franchises, and to that end desired to commence work upon the same in the construction of the said road, and for the purpose of completing the same at the earliest practicable moment, and to operate its cars and exercise the privileges and franchises granted, as soon as practicable, and that these things were necessary to facilitate public business and transportation, and that from the operation of the roads and the exercise of the franchises and privileges large profits would accrue to the appellant, and that the council of the city of Los Angeles and other public authorities threatened and intended to prevent appellant from constructing, or even attempting to construct, the street railway on the public streets in the city of Los Angeles, and to forcibly prevent appellant from constructing or attempting to construct the railways on the streets mentioned, or exercising any of the rights, privileges and franchises therein granted, and that on the 26th of February, 1902, the council had passed an order instructing the mayor, the street superintendent and the chief of police to stop and prevent any attempt that the appellant might make to construct any street railway on any of the said public streets, with all force at their command, and that these public officers and police officers, acting under said instructions, would undertake by violence to prevent appellant from constructing a railway, or attempting to construct it, or exercising any of the privileges, or having any enjoyment of the property so acquired by it unless pre-

vented by the court. [Trans. pp. 19-20, par XXXIII.]

And then follow further allegations of what was required of the appellant under this grant, and that these franchises had been granted under the terms expressed in the notice, and under the provisions of this statute, and the danger of forfeiture accruing in the event that they did not comply with the terms and conditions of the grant.

And in the 35th paragraph, commencing on page 21, it was alleged that this bond was given for the performance of the contract which had thus been made between the city and the appellant, and in pursuance of the said statute.

Complainant then again set forth its claim that by the award and grant of the said franchises, in consideration of the payment of the sum mentioned, and of the execution of the said bond, the appellant had become vested with the title to the said franchises, rights and privileges and were bound by all the terms and conditions of the said grant, and that it still is the owner in fee of all said rights and privileges, subject to said terms and conditions.

And in paragraph XXXVII of the bill, alleged that in order to perform the said conditions it was necessary to commence the work immediately, and that to commence such construction it would be necessary for the complainant to incur great expense in the purchase of necessary material and machinery and appliances of all kinds which would be necessary to the construction of the said road, turnouts, switches, and other adjuncts to the operation of the road, and to

provide rolling stock and other appliances necessary to the equipment and operation thereof. That contracts would have to be made for the purchase thereof laborers employed, and contracts made for the construction of the road, and work commenced immediately, and that the council and the city had threatened and intended and would, unless restrained, prevent the complainant from commencing the construction of the road and such works and appliances, adjuncts and accessories necessary to the construction and operation of the road, and the exercise of the said rights, privileges and franchises so purchased, and thus the expenditures that might be made in the preparation for the construction would be of no effect unless the complainant were protected against this threatened interference.

And in paragraph XXXVIII [Trans. pp. 22-23] it was further alleged that the council threatened and intended, and would, resell these franchises, and in paragraph XXXIX, that the said proceedings so taken reconsidering the vote and attempting to cancel and annul the grant were void, and of no effect whatever but if such resale were made it would cast a cloud upon the title of the complainant, and would greatly hinder and impede the complainant in the exercise of the franchise, and in the use and enjoyment of the property so belonging to it under the grant.

Acting under the order of the council, the treasurer of the city did offer to return the $152,900 to the appellant, and also to return the said bond, but the appellant refused to accept either, and denied the right

of the city to cancel, vacate or annul the grant, or in any manner affect the rights of the plaintiff under the purchase.

It was further alleged in paragraph XLI (pp. 23-24) that if the council did resell these franchises, the city would aid such purchaser with the police force of the city to take possession of the said property, roads, franchises, rights and privileges, and construct the road over and along said streets, and oust and exclude the complainant therefrom, and a multiplicity of suits would become necessary to protect the property rights of the appellant, and that the litigation would entail great expense, and also that the complainant would be compelled to expend a large sum of money in providing for the construction of the road, or else hazard the forfeiture of its right by refraining from making such expenditures and incurring obligations for material, appliances, etc.

In paragraph XLII (p. 21) it is alleged that all of these proceedings attempting to repeal, rescind, vacate and annul the grant made, and to wrest the property purchased from the complainant, and prevent the exercise of the rights, privileges and franchises granted, were all in violation of the constitution of the United States, and void.

It was further alleged that the matter in dispute, exclusive of interest and costs, exceeds the value of $2,000, and is of the value of not less than $152,900

The prayer was for a decree that the complainant was the owner in fee simple of the property, rights, privileges and franchises granted to it; that the de-

fendants had no right, title, or interest in them; that the orders and resolutions of the council of the city pretending to reconsider the vote by which the rights, privileges and franchises were granted to the complainant, and all the proceedings taken by the council for the purpose of divesting the title of the complainant to the property, rights, privileges, etc., and all the proceedings attempting to impair the contract rights of the complainant under the said grant, or to hinder and impede the complainant in the use and enjoyment of its property, or to rescind, vacate or set aside the sale, or to resell the same, were null and void, and that they be vacated and set aside, and the defendants and their officers, agents, employees and attorneys be restrained from preventing the complainant from constructing the said road, turnouts, switches, etc., or from preventing the complainant from operating its road, and exercising all of the rights, privileges and franchises granted, or ousting or attempting to oust or dispossess the complainant, etc.

The questions involved are:

1. Did the court have jurisdiction of the subject matter of the action?

2. Did the rights, privileges and franchises struck off, sold and granted to the plaintiff vest in the complainant under the provisions of the statute and under the facts stated in the bill.

3. Did the subsequent action of the council attempting to rescind the sale, and to prevent the appellant from exercising the rights, privileges and franchises granted, and using and enjoying the prop-

erty claimed by it, deprive the appellant of its property without due process of law, and in violation of the constitution of the United States?

4. Did the sale of the said franchises, rights, privileges and properties to the complainant by the said city council, and the payment of the said sum of money and the execution of the said bond, constitute a contract between the parties?

5. Was the action of the city council a law impairing the obligation of that contract?

6. Was the bill of complaint uncertain in the particulars mentioned in the demurrer of the city and the council and the mayor to the bill?

These questions arose out of the facts alleged, and the demurrers to the bill.

The cause was argued before the circuit court, and submitted, and the court sustained the demurrers to the bill. The court filed a written opinion in the cause, from which it will be seen that the demurrer upon the ground that the court had no jurisdiction was overruled, and the decision of the court sustained the jurisdiction, and the court then proceeded to dispose of the case upon its merits, and was of the opinion that under the facts alleged, the rights, privileges and franchises mentioned in the bill never vested in the complainant, and that the council had no authority to receive or accept the bid of the complainant nor to award the franchises to it, and therefore, of course that the subsquent action of the council did not deprive the plaintiff of any property, nor impair the obligation of any contract.

II.

Specification of the errors relied upon.

1. The court erred in sustaining the demurrers of the defendants, the City of Los Angeles, the Council and the Mayor, to the plaintiff's bill of complaint.

2. In sustaining the demurrer of the defendants, the Los Angeles Traction Company, Wm. S. Hook and E. A. Davis, to the complainant's bill of complaint.

3. The court erred in holding and deciding that the complainant had not acquired, and was not the owner of, the franchises and privileges to construct and operate the street railway in the city of Los Angeles, as alleged in the complainant's bill of com plaint.

4. The court erred in deciding that the complainant had not a valid contract with the city of Los Angeles entitling it to exercise the privileges and franchises to construct and operate the street railway in said city as alleged in said complainant's bill of complaint.

5. The court erred in deciding that the proceedings of defendants, the city of Los Angeles and the council of the city, for the sale of the franchise and privileges set forth and described in the complaint including the striking off and granting the same to the plaintiff, and the payment of the purchase price thereof, and the execution of the bond, did not vest the title to the franchises and privileges in said plaintiff.

6. The court erred in deciding that the proceed-

ings of the defendants taken subsequently to striking off, selling and granting said franchises and privileges described in the said bill of complaint of the plaintiff and the payment of the purchase price thereof, and the acceptance of the same, and the execution of the bond, and approval thereof, did not deprive the plaintiff of its property so purchased, without due process of law in violation of the constitution of the United States as alleged in the complainant's bill.

7. The court erred in deciding that the said acts of the defendants did not, as alleged in the complainant's bill of complaint, impair the obligation of the contract to construct and operate a street railway in the city of Los Angeles, in violation of the constitution of the United States.

8. The court erred in deciding that the defendants did not take the property of the complainant namely, the said franchises and right to construct the street railway as alleged in the complaint, without due or any compensation, and in violation of the constitution of the United States.

9. The court erred in dismissing the complainant's bill of complaint.

10. The court erred in decreeing that the defendants should recover from the complainant their costs and disbursements in the cause.

III.

Brief of the Argument.

In the court below the objection to the jurisdiction was argued at great length, and doubtless will be insisted upon in this court, and there were many questions raised as to the proceedings before the council in the disposition of this franchise which were not considered in the court below nor decided, but which doubtless are open to consideration here, and will, or some of them will, doubtless be insisted on here. For that reason we shall, before concluding the brief, consider some questions not specifically considered or decided in the court below, but in this argument we shall first direct our attention to the consideration of the propositions decided against us by the court, and upon which its decision was based.

It will be seen, from an examination of that opinion, that the court's decision turned entirely upon the interpretation placed upon the statute under which the proceedings were taken and the property rights herein asserted to belong to the plaintiff, claimed.

All of the facts stated in the bill of complaint were of course, by the demurrers admitted to be true. The proceedings therefore did take place before the council, both with respect to granting the franchise and to vacating it, which we have alleged, and not only are these facts accepted by the court to be true, but also the allegation of the fraudulent device resorted to by the Traction Company to exclude competitive bidding was accepted as true, and its fraudulent character severely denounced by the court.

After stating in the opinion that when the time thus fixed had expired (that is, for the payment of Murray's bid),

> "And Murray had failed to make the required deposit, the action that should have been next taken is prescribed in the last clause of said section already partially considered which provides that if the successful bidder fails to make the deposit required of him, the franchise shall be granted to the next highest bidder therefor. When, speaking concretely, the contingency referred to in said clause, namely, Murray's failure to deposit the amount of his bid, occurred in the afternoon of February 11, 1902, it was then the duty of the council to grant the franchise to the next highest bidder, unless there was some sufficient reason for a refusal. This qualification of the council's duty I make because of the charge in the bill that the next highest bidder was fraudulent. Assuming the truth of this charge, which must be done on demurrer, the council ought not to have granted the franchise to said bidder. When it refused to do so, however, its power in the premises was exhausted because the said act of 1901 makes no provision for any subsequent proceeding, and the alleged grant of the franchise thereafter to complainant was without authority and void. The only way said franchise could have been lawfully granted after its refusal to the next highest bidder was under and pursuant to a new advertisement.
>
> "Complainant's argument, that this construction of said act impairs its efficiency by enabling designing and unscrupulous presons to defeat the disposition of any franchise offered for sale under such act, if not without force, can but be

deemed inconclusive, for the rule is well settled that the language of a statute when plain and unequivocal determines its meaning regardless of consequences. * * *

"The truth is, said act of 1901 never contemplated the scandalous frauds here charged, without denial, against some of the defendants, and hence, it may be, no adequate safeguards against them were erected. This defect in the law, however, if it exists, is an omission to be supplied by the legislature, not by the courts.

"The declaration of the council, made after Murray's default, that he was a fraudulent and irresponsible bidder, and that his bid was null and void, is an immaterial circumstance. If such an inquiry was authorized, it must have preceded the order striking off the franchise to Murray, since said order necessarily determined the lawfulness of his bid, and there was no power in the council to review said order. * * * After the franchise had been struck off all the council could lawfully do under the pending advertisement, was to allow Murray 24 hours to make the deposit, and if he failed to do so, grant, or, on sufficient grounds, refuse to grant the franchise to the next highest bidder.

"For the reasons above given I am of the opinion that the complainant has not acquired the franchise it here claims, nor has it any valid contract with the city in relation thereto.

"This conclusion renders it unnecessary for me to pass upon the other questions which have been argued by counsel, and are outlined in an earlier part of this opinion."

Trans. pp. 47-48.

We have quoted this part of the opinion first for the purpose, in part, of showing that there was and is no question of how the allegations of the bill with respect to this fraudulent scheme to prevent bidding was regarded by the court below, or, for that matter, by the defendants themselves. It was a deliberately intended fraud upon the statute of the state. The supposed three bidders, Hook, Davis and Murray, were one bidder, and that bidder was the Los Angeles Traction Company, who was using all three as pretended competitors, but in truth arranging their bids in such manner as to preclude competition, inspired by an interpretation of the statute, which in this case was, except as to one part of it, sustained by the court below. The circuit court was clearly of the opinion that this fraudulent combination ought not to have been permitted to themselves receive the fruits of their cheat. But it was the opinion of the court that the provision of the statute contained in section 5, which declared that the franchise or privilege should finally be struck off, sold and granted by the governing body to the highest bidder therefor in gold coin of the United States, and that said successful bidder should be required to deposit with such governing body or such person as it might direct, the full amount of his or its said bid within 24 hours thereafter, and in case he or it should fail so to do then such franchise or privilege should be granted to the next highest bidder therefor, meant by this "next highest bidder" a bid already made, and that being the one which was in amount next after that forfeited by reason of the failure of the highest bid-

der to make the payment, and that all bidding was ended when the competitive bidding before the council made at the time of the opening of the sealed bids, had been put in. Not only that, but that this meaning of the statute is so plain, so obvious, so unequivocal, that no conditions existing in a particular instance, no argument that can be made against it, no rules of interpretation can be applied to it, for the purpose of overcoming that interpretation. In other words, that the case comes within the rule mentioned by the court which we have before quoted, namely that the language of the statute, when plain and unequivocal, determines its meaning regardless of consequences, and that in this case the statute is of such character that it admits of no other interpretation, that it is itself as plain as any language that could be offered in explantion or interpretation of it.

The court, in the course of its opinion and after disposing of the jurisdictional question, then states the defendants' objections to the validity of the alleged grant, and generalizes them under three heads, (1) that in the proceedings had by the city council of Los Angeles for the sale of said franchise, certain requirements of the act of 1901 were not complied with, and therefore there was no valid grant. (2) That the act of 1901 was void because it undertakes to delegate municipal functions to a special commission in violation of article 11, section 13, of the constitution of California; and (3), that if constitutional, it did not apply to the city of Los Angeles because it concerned only municipal affairs, and as to such affairs the city, by article 11, section 6, of the constitution

of California, as amended in 1896, is exempt from the operation of general laws, and subject only to its charter whose provisions require for *granting a franchise* the joint action by an ordinance of the council and mayor.

See Trans. p. 44.

The court then says that either of these objections, if good, is fatal to the alleged grant, and "I proceed at once to the consideration of the first."

And after saying that in determining whether the proceedings were lawfully complied with, the rule that the mode is the measure of power, and aside from the designated mode that there is no power, should be carefully observed, and also that in this particular case negative words were employed which gave to this rule its greatest force, namely, it was provided that the franchise should be granted upon the conditions in that act provided, and *not otherwise*, additional energy was imputed to these rules of construction by section 10 of the act of 1901, which we have already referred to, which made it a misdemeanor, and subjected a member of the council to be deprived of his office in case of a conviction of a violation, or attempt to violate, that statute by his vote.

Trans. pp. 44-45.

The learned judge of the court below then proceeds to consider the provisions of the act which bore more particularly upon the point of his decision. Those provisions are contained in the sections which we now quote.

"Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town, within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the municipality an application, and thereupon said governing body shall, in its discretion, and when the application is accompanied with a petition praying that the same be granted, signed by the owners of three-fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, must advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily news-

paper, and if there be no daily paper published in such city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty (20) nor more than thirty (30) days before any further action can be taken thereon.

"Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided further, that if the franchise be a renewal of a right already in existence the payment of said percentage of gross receipts shall begin at once.

"Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroads, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be

conclusive as to the amount of the gross receipts of said extension.

"Sec. 5. Said advertisement shall also contain a statement that the said franchise will be granted to the person, firm, or corporation who shall make the highest cash bid therefor; provided only, that at the time of the opening of said bids any responsible firm or corporation present or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid, so made may be raised ten per cent. by any other responsible bidder present, and the said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do then the said franchise or privilege shall be granted to the next highest bidder therefor.

"Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within said time said franchise so granted shall be declared forfeited, and shall be

completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

"Sec. 7. The grantee of every franchise or privilege granted under this act shall file a bond running to said city and county, city or town, with at least two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill, and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and in case said bond shall not be so filed, the award of such franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of said governing body.

"* * * * * *

"Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one

person, firm, or corporation, as against another, in bidding for the purchase thereof.

"Sec. 10. Any member of any common council or other governing or legislative body of any city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction."

Now the interpretation of the statute in this case was this: That sealed bids were to be received up to the time named in the advertisement, and providing that *at the time of the opening of said bids* any responsible firm or corporation present or represented might bid for such franchise a sum not less than ten per cent. above the highest sealed bid, and that bid might be raised ten per cent. by another, etc., and which franchise should finally be struck off, sold and granted to the highest bidder therefor in gold coin of the United States.

Then this bidder is required to deposit with the governing body the amount of his bid within twenty-four hours. If he doesn't, it should be granted to the next highest bidder therefor.

We here call attention to the last line of section 5 as it is printed in the transcript, where the language is that the "said franchise or privilege shall be granted to the next bidder therefor." This is a mistake, the word "highest" is omitted before "bidder."

In other words, according to the opinion of the circuit court, the first step in the proceeding is the advertising of the sale. Second, sealed bids. Third at the time they are opened, competitive bidding. Fourth, strike off to the highest bidder. Fifth, payment of the money within twenty-four hours. Sixth, in case of failure, then the council must look at the bids already in, and award to the highest of those thus remaining, unless, as was said in the opinion, there be good reason for not granting to him, and then the only proceeding possible to the council is to readvertise and sell, and therefore, no matter what the consequences may be, this was the limit of the council's power, and the acceptance of any bids, or entertaining any bids thereafter upon the same proceeding or advertisement was without authority.

An elaborate and ingenious and able argument is made by the learned judge in support of this interpretation, and the first thing to which we shall address ourselves is to reply to that argument, and endeavor to show that this interpretation is not admissible.

And now it is submitted that it is a rule universal that in construing the language of a statute or other instrument we are to consider the objects which it has in view, and its various clauses are to be construed in subordination to this purpose. It is not difficult to see what the main purpose—the main intent—of this act of the legislature of California is. It had for its object the sale of franchises to be exercised in municipalities, described in this statute as "city and

county or city or town." The proceeds of such sales to go into the revenues of the city. Such is the object of the statute, and to dispose of these franchises in the best manner and for the best prices, there were other provisions which were directed to securing fairness between competing bidders. The council itself was shorn of all power to bring into the advertisement any term or condition that would favor one person or corporation against another, or give any advantage in the bidding at all. To express it briefly, to sell for a price, and the best price obtainable, upon a fair sale, is written all through the statute, and is unmistakable.

Now these objects of the statute can all be defeated by anybody, at any time under any advertisement, if such a strict construction of the other provisions of the statute is to be indulged as were applied in this case in the circuit court. In the sale of street railway franchises, and we suppose in others, there may be two kinds of competitors having different objects in view. One class is where both or all competitors are bidding through a real desire to obtain the franchise, construct the road, and operate it. But another competitor in bidding may appear, not because he desires the franchise himself. He may have, and frequently does have, all the street railway franchises required or desired by him, and what he most wishes is to prevent competition with him. In the former case he is, of course, desirous of obtaining the franchise at the lowest possible price. In the latter case he is rather interested in defeating any sale at all.

Both of these interests of the bidder are directly opposed to the interests of the seller, and directly antagonistic to the aim which the statute seeks to accomplish. It is obvious, too, that under such provisions for the sale of property as are incorporated in this act, the real competition will, unless defeated by some trick, or device, which the statute undertook to prevent so far as the council is concerned, take place after the bids are opened and before the council. It is not likely that one who in good faith wishes to purchase, and is willing to pay a fair price, would discover by his sealed bid the extent to which he is willing to go, or the last dollar that he is willing to pay, and when dealing honestly it is evident that he would expect the competition to be developed after the bids were opened.

Now we see by such a device as was here resorted to by our adversary, and under the interpretation of the statute adopted by the circuit court, that anybody can defeat a sale altogether, or, if he desires a sale defeat any real competition by a device that amounts to nothing except a plain common cheat. Indeed, if we apply the same strict rule of interpretation to all of the provisions of this statute that were adopted by the learned circuit judge in his interpretation of the particular ones under consideration, a sale could have been absolutely defeated, and doubtless would have been, by the hocus pocus of these sealed bids had it not been for the presence of the complainant on the second day to overreach the bid of $139,000. "For," says the court, "if the money is not paid within twenty-

four hours the power of the council ended with the grant to the next highest bidder."

The next highest bidder was this same company, the Traction Company, for $139,000. Suppose there had been no opposition offered to them on the second day, and the franchise had been granted to the next highest bidder, namely, Davis, on the bid of $139,000, and suppose Davis failed to put up the money within twenty-four hours, then, we say that upon the same strict construction, the statute has made no provision either for any further bidding or for the acceptance of any other bid, and yet it manifestly intended to sell for money, and gold coin of the United States. When the legislature said that the franchises should be granted to the next highest bidder, it did not mean to say that it should be so granted whether he paid for it or not. The franchises must be granted "upon the conditions in this act provided, and not otherwise." And in section 2 of the act it is provided that the advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder. In section 5 that the advertisement is required to contain the statement that it will be granted to the person, firm or corporation who shall make the highest cash bid therefor. In the same section it is again said that it shall be finally struck off, sold and granted by the said governing body to the highest bidder therefor, in gold coin. In the same section it is said that if the amount of that bid is not put up in gold coin within twenty-four hours, it shall be granted to the next highest bidder therefor. And

certainly the purpose of the legislature was not so changed at this point as to command that it should be so granted without the payment of the sum bid. And so we say, applying the stringent rules of construction which were adopted in the court below, had it not been for the presence of the complainant on the second day, and in pursuance of the statute the council had made the grant to the next highest bidder, and he had failed, that would have ended the power of the council to proceed in the case at all, and thus the sale could have been defeated altogether, and whether that was the intention in this particular case or not makes no difference for the purposes of the argument, for it is manifest that by such a contrivance, the sale can be defeated, and by the contrivance adopted in this case, if the statute had been followed, although the sale might not have failed altogether, it would have gone to a bidder who had by this device prevented any competition from being made with him at the sale of the franchise. Nor is it at all necessary that these devices should be adopted in the sealed bidding. The same thing can be accomplished at the pretended competitive bidding, for suppose that two or more should combine for the purpose of preventing competition, or even defeating a sale, and sealed bids are presented by one or more of the combination. They are present when these bids are opened. Now if they find that they have the highest bid in there one can immediately arise and bid a sum so exorbitant as to end the competition at once. Or, if he has not the highest bid, one can raise the highest bid ten per cent. and another of the same combination put in

an extravagant bid which he knows no person who in good faith intends to pay the money, will raise it ten per cent., and he can fail to pay, thus throwing the property to his confederate, who may also fail if he chooses, and defeat the sale altogether. It is no answer to say that when the competing bidding commences that the competitor must be a responsible one. For the word "responsible" here can mean nothing more than one who is able to put up the amount of his bid if he desires to do so. Now the statute in this case, it will be observed, does not make any provision for recovering from a bidder the amount of his bid. By making the bid, he does not become personally obligated in a legal sense to pay the amount. The statutory consequences of the failure to pay within twenty-four hours is that it is awarded to the next highest bidder. There is no provision in this statute, as it is with reference to some judicial sales, that if the bidder does not comply with his bid the property may be resold and the difference recovered from him, and hence under this statute, in order to defeat its aims, all that is required is a person of financial responsibility and not troubled with any great deal of integrity. His financial responsibility doesn't make him liable to pay in the event that he refuses, but on the contrary, the statute itself has declared the consequences of the failure to pay the money, and that consequence is not that the party bidding and failing to pay shall be personally responsible for it. Hence we submit that it is perfectly obvious that under the construction adopted by the learned judge of the circuit court, the sole object of this statute

namely, the largest price at a fair sale, may be defeated at any time by the simplest form of cheat, and with no great difficulty a sale can be defeated altogether, and this now is accomplished by the construction of the very provisions of the statute which were designed to effect its main purpose, first of the sale, secondly for the highest price.

And we respectfully submit that before the mere detailed provisions for carrying the act into effect shall receive such a construction as to defeat the statute altogether and to prevent its having any effect, the language should be of such a character as would admit of no other possible construction. Indeed, we are not sure that the authorities would not amply justify us in asserting that if any such terms had found their way into the statute, they should be construed out of it rather than permitted to turn the statute into an absurdity. We are not without authority, as we shall hereafter show, for just such action were it necessary. But, is it necessary? The language is that if he fails to make the payment, then the said franchise or privilege shall be granted to the next highest bidder therefor. The construction put upon this term by the circuit court is that this next highest bidder must be found among the persons who have already made a bid upon that franchise, either a sealed bid or one made after the sealed bids are opened. That it did not contemplate any further bidding, and indeed is exclusive of any further bidding. But now this term "next highest bidder" is not a term that of itself points to any particular time, and more especially is not limited to a time past. When the statute said that the

advertisement must state that bids would be received for such franchise, and that it would be awarded to the highest bidder, no one would pretend that you could ascertain from the mere use of the words "highest bidder" the particular stage of the proceedings at which such bid should be ascertained. If we came to any conclusion upon this subject from the use of those words alone, we should suppose that the one who put in the highest bid at the conclusion of the bidding would be the person intended. But we find in section 3 that this person who is here called the "highest bidder" is also named the "successful bidder." We find this also repeated in section 5, where the franchise is to be finally struck off, sold and granted to the highest bidder therefor, in gold coin of the United States, and said *successful bidder* shall be required to deposit, etc. Here the successful bidder and the highest bidder are manifestly one and the same person.

And this successful bidder is required to deposit with the governing body or such person as it may direct, the amount of his or its bid within twenty-four hours; otherwise, the privilege shall be granted to the next highest bidder therefor. Now we submit that it is not a strained or unnatural paraphrase of this term, "the next highest bidder," to say that it is the person who next bids the highest, and that there is no necessary conclusion that the statute intended to put an end to all bidding except such as took place at the time that these bids were opened. In the argument of the case before the court below, our adversaries attempted to make much out of the proviso that *at the*

time of the opening of said bids, any responsible firm or corporation present may bid for such franchise or privilege, a sum not less than ten per cent., etc. And they said that by the use of this language, "*at the time of the opening of said bids,*" the legislature meant to exclude all bidding after that time. But now no such construction as that can be maintained. In the first place, the legislature manifestly did not mean at the precise time that the bids were opened that all competitive bidding should be concluded, for even the first bid could not be made for less than at least ten per cent. more than the highest of the sealed bids, hence the bids must have been opened and the highest ascertained before the bidding commenced. Furthermore, the legislature could not have meant that the bidding should end then and there, at that session of the council. The council could fix any time of the day at which the bidding should commence. As a matter of fact, it did in this case fix eleven o'clock in the forenoon of February 10th. It could just as well have fixed five o'clock in the afternoon of the same day. And contingencies might have arisen that would have carried the bidding over to another day necessarily, or else the sale have fallen through. And even commencing at eleven o'clock, there might have been ample reasons for the adjournment of the sale. Suppose the president of the council had fallen dead about the time the bidding should have commenced. Could not the council have adjourned until the next day without defeating all proceedings for the sale under that advertisement?

We say with respect to this phrase, that no such an interpretation as was contended for is at all necessary. One of the very definitions given in the dictionaries of the word "when" is, "at the time." Now it is no forced construction of this language to substitute its synonym, and the meaning is simply that when the bids are opened then any responsible firm, etc., can bid more than the highest bid. Indeed the court in its opinion in this case unconsciously, or at least indefinitely, adopts this word "when" as being the precise equivalent of the statute. Thus on page 47, the court says:

> "In the case at bar, therefore, when the sealed bids were opened and no bid of ten per cent. above the amount bid by Murray was then made, the action of the council," etc.

To be sure the court below did not adopt this narrow construction contended for by the counsel for the appelles, but the court does adopt a view not very different from that of the appellee, for, in the opinion, commencing on page 45 of the transcript, it is said:

> "The precise question here presented is this: When must the competition subsequent to sealed bids, for which said section provides, take place? To this question the first clause of the foregoing extract from said section makes answer as follows:"

Then follows a quotation from said statute which begins, "At the time of the opening of the bids," etc., and after quoting it, the court said:

> "This clause does not confine the time of com-

petition to the precise moment of the opening of such bids, but it does make it the next step in the series of steps prescribed by said section, and thus requires it to take place before the franchise has been struck off to the highest bidder. Said clause certainly does not contemplate that bidding shall continue after the franchise has been struck off. With that construction the clause would be meaningless.

"Again, the last clause of said section, which referring to default of the successful bidder in the matter of the deposit required of him, is as follows: 'And in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor,' forbids, by unavoidable implication, the idea that there can be any competition after such default. It will be observed that the words 'struck off, sold and,' used in a previous clause of the section, are omitted from the last clause. These words 'struck off' and 'sold,' which are ordinarily employed, and particularly appropriate to designate the closing of a public sale to the highest bidder such as that provided for by the clause where these words appear, would have been out of place in, and hence were designedly omitted from said last clause, for the reason that it provides for a contingency, namely, the failure of the successful bidder to deposit the amount of his bid, which can only arise after the bidding has been closed. When the bidding has been closed and the successful bidder declared, or, in other words, when the property has been 'struck off' and 'sold,' the next and last thing to be done is a formal transfer of ownership by such means as are suited to the particular case, and this final act is fully and

> accurately prescribed in said last clause by the use of the word 'granted.' Under said clause there is to be no striking off, no selling; those stages of competition have been passed; the only act to be performed is that of granting."
>
> Record, pp. 45-46.

Now, before calling attention to other arguments by which this position is sought to be fortified, we pause to answer this. Yet we should say first, that in quoting from the previous clause the very word which the court omits itself shows that the legislature had not any such distinction in its mind. The legislature did not stop with the words "struck off, sold and," but the very word necessary to complete the sense there is "granted," "struck off, sold and granted," and it is submitted that the omission of some of those words in the subsequent clause possesses no significance at all, and especially as we find that several different terms are used in this statute to express manifestly the same thing. Thus, in section 2 it is said that the franchise will be awarded to the highest bidder. In section 3 it is said that the character of the franchise or privilege proposed to be "*granted*" must be stated in the publication. In the 5th section, the said franchise will be granted to the person, firm or corporation who shall make the highest cash bid therefor. This is the first clause in the section, and it does not say "struck off, sold and," but simply that it will be "granted" to the person who shall make the highest cash bid therefor, and in the same section occurs the provision that if that person

does not pay the money in twenty-four hours it shall be granted to the next highest bidder.

Passing from the particular clause referred to by the court, we find in the same statute that after there has been the grant, that is, the money has been actually paid, if the bond is not given within five days, the award of the franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of the said governing body.

In section 9 it is said, "No clause or condition of any kind shall be inserted in any franchise *or grant* offered or sold under the terms of this act," as though the grant was the thing which had been sold.

It is obvious from these provisions that the legislature of California had not in its mind the notion of employing, with technical accuracy, these various terms, but the meaning of each of them wherever it is encountered is to be determined by considering the substance of the thing done, and in view of all the language of the act. In the interpretation of this act, we submit that it is not a fair construction to say that "struck off and sold" is the proper and appropriate expression for the first proceeding that takes place by the governing body upon this highest bid, for taking this act all together it is perfectly manifest that no title, no right of any kind, was intended to pass until the money was paid. Now the mere fact that the language of the statute is, or is supposed to be, that it should be struck off, sold and granted to this highest bidder, does not exclude the interpretaton

which we here contend for, because as we said before when we view all of the provisions of the act, we see that struck off, and sold, and granted, in that clause did not mean the vesting of the title. And in the event that he fails to pay the money, we are not told that the award shall be set aside as in the case of his failure to file the bond, but the provision is that the franchise shall be granted to the next highest bidder, and equally obvious is it that it was not intended to be granted to the next highest bidder except upon the payment of the money. But then again, while the statute in this respect is somewhat loosely constructed we submit that in the very phrase quoted whereby the learned judge of the court below conceived that there was a difference made between this first highest bidder and the next highest bidder, does not warrant the construction which the court was evidently putting upon it. For it will be observed that in section 5 where that phrase occurs the language is, "And said franchise or privilege shall *finally* be struck off, sold and granted by said governing body to the highest bidder therefor in gold coin of the United States."

Now this language is hardly susceptible of such an interpretation as to make it apply only to the person who was first ascertained to be the highest bidder, for it is *finally* to be struck off to the highest bidder, and furthermore in the very next clause of the sentence the language changes, "and said *successful* bidder shall be required to deposit." To us it seems obvious that the very provision of the statute referred to, is itself dealing with the person who is finally entitled under its provisions, to the grant of that franchise.

And furthermore, that it clearly was intended to be understood that if the first highest bidder fails to pay the money, and it is awarded to the next highest bidder, whoever he may be, or however ascertained, and he fails to pay within twenty-four hours, it shall go to the next. It is the finally successful bidder that the statute is contemplating, and not making a distinction between the first of several highest bidders, and all who come after him under that name.

Hence, if it be true that when the bidding has been closed, and the successful bidder declared; or, in other words, when the property has been struck off and sold, the next and last thing to be done is the formal transfer of ownership, it does not prove that there can be no further bidding after the property is first awarded to the first highest bidder. It is only after it is finally struck off to the really successful bidder under the statute that the bidding is closed. Under no other interpretation would the court below have been justified in saying that the next and last thing to be done is a formal transfer of ownership, and it is accurately expressed by the use of the word "granted," for we say again, that if the right to the grant does not accrue, the property is not sold, and it could not be granted until the money is paid. And this is shown by the subsequent provisions which we have already quoted with respect to the failure to give the bond. There the legislature recognized the fact that there has been an award and grant made of the property, and it is for that reason that if the bond is not forthcoming, the award of the franchise shall be set aside

Again: The court below says that on account of the fraud practiced by these fraudulent defendants the franchise ought not to have been granted to them, but that the only way said franchise could have been lawfully granted after its refusal to the next highest bidder was under and pursuant to a new advertisement. [Trans. p. 47.] But it is respectfully submitted that if we are to indulge in such strict construction, it could not have been granted under a new advertisement. The statute made no provision for a new advertisement except in one case only, and that is where the money had been paid, but the bond had not been filed. In that case, said the statute, the award should be set aside and the sale might be granted to the next lowest bidder, or again offered for sale, in the discretion of the said governing body. But this notice of the sale, or advertisement of their intention to sell, is the offer to sell, and as this is the only provision for offering it for sale again, it is submitted that the power of the council under this application for the franchise would have ended if the construction of the court below be correct, and it would have required a new application, and not merely to advertise it again.

Now, in the court below one of the arguments of the counsel for the appellees was that the acceptance of further bids was not intended, because presumably when the franchise had been struck off to one party, the competitors, or those who would have competed would, in all probability, return to their various homes or business, or pleasures, and would not have been on hand again on the 11th of February to enter into competition at the sale of the property; that they

would have supposed that the thing was concluded, and that no further bidding could take place. But it is submitted that this is not an argument for their construction of the statute, but on the contrary it assumes the construction, and this proposition is merely a reason for the provision of the statute. It has no validity as an argument to prove that that is the construction of the statute, for if the construction is not correct, then neither is the reason given for it correct. If when it is struck off to the first highest bidder, and the statute says that if he does not pay in twenty-four hours it shall be granted to the next highest bidder, if the meaning is, that if the party who has made this bid does not pay the money that then other bids may be received, then it would not be true that there would be any presumption that those who desired to bid would not return. If, in fact, it amounted merely to an adjournment of the council for twenty-four hours contingent upon the failure of the person to whom it was awarded paying the money, then they would be just as much bound to appear, and expected to appear, as though there had been a postponement from any other cause. And here we think that the provision of section 7 with regard to the failure to file the bond becomes significant. When the money has been paid and the property struck off, sold and granted, then it may fairly enough be supposed that those who have been bidding have retired not to return again, and that being the case, the statute has made a provision which it did not make with reference to the failure to pay the money, namely, the award is to be set aside and the franchise granted to

the *next lowest bidder or again offered for sale.* Now it has been boldly assumed that this term "next lowest bidder" was a mistake, a misprint, or an inadvertence, and that it really meant the next highest bidder. But it is obvious that it was no mistake at all and that the legislature meant just what it said, that it was the bid next *lowest*, and not the next highest bidder, that was intended here to be accepted, namely, it was a lower bid, but the one which came next after the highest bid. If any mistake in the use of a word at all, the word should have been "lower" instead of "lowest." But we submit that the legislature was there making a provision to meet a case just such as our adversaries have contended was being made in the first instance. The property has been paid for, struck off, sold and granted, and the bidders have gone about their business and five days are allowed for the filing of this bond, and no one is expected to remain in attendance upon the council from day to day, for that bond may be filed at any time during the five days, and just when cannot be known to anybody. The sale could not be postponed to a day and hour certain, and in that state of the case, the legislature said, "you may accept the next lowest bid, or you may offer it again." The language shows that a distinction was intended in the results of the two failures, the failure to pay the money, and the failure to give the bond, and the reasons for such distinctions are apparent and do not support the argument of the counsel for the appellees, nor the interpretation made by the court.

Another, as it seems to us, irresistible argument against the interpretation put upon the language of

the legislature by the court below is this: The statute has left us in no doubt of the intention to secure the highest price, and it has put such limitations upon the details of carrying out the object of the statute as it saw fit. The bidding is not bound to be kept open for bids in advance of a previous bid, only by an infinitesimal quantity, but it intended that bids ten per cent. in advance of the highest bid previously made should be accepted. Now, if one bid ten per cent. above all other bids, another person might be willing not only to give as much, but to give more, and yet not to give ten per cent. more than this bid, so that if he fails to put up the money and it goes to the bidder whose bid is already in and next in order, then the franchise has been sold to one, when another would have been willing to give not only ten per cent. more, but perhaps fifteen per cent more, but not twenty per cent. more than this next highest bidder. Yet he would have been compelled if he were to compete, to raise the highest of those bids ten per cent., and indeed, might be required to pay fifty per cent. more since, if the last bidder had raised the previous bid by twenty, or thirty, or forty or fifty per cent or even more, and then failed to pay the money, the franchise under the construction here adopted would go to the next bid already in, notwithstanding that a competitor present at the time of the bidding would have been willing to give twenty, or twenty-five or thirty per cent more. Nothing in the entire act is more manifest nor more plainly expressed than that the statute did not intend any such a result to be possible. It had secured fair competition, so far as any action of the council to pre-

vent it was concerned, and before we determine that they had left it to the bidders to defeat its objects at will, we say again that the language should admit of no other construction, and even then it would be impossible to reach the conclusion that the legislature had intended to permit any such thing.

> "If," said the court below, "the legislature had intended that there should be further competition after default of the successful bidder, it would have chosen apt words to express the intention rather than language which implies the contrary. And, besides, would have prescribed fully the nature and duration of the subsequent competition, that is, whether it was to be by sealed or open bids, and when it was to close."
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> Trans. p. 46.

In all this, it is submitted, that the construction adopted is assumed. In other words, the construction is already reached before we come to this argument. This, we have considered before, and have called attention to the language of section 5 of the act, wherein the successful bidder is plainly synonymous with the person to whom it is *finally* struck off, sold and granted, and that he is not necessarily the person who, in the first instance, may have appeared to have the first highest bid, but it is not finally struck off, sold and granted, until he pays the money. And it is this person to whom it has been finally struck off, sold and granted and who therefore has paid the money, that is the successful bidder. If this is the true construction of the statute, the bidding is not closed until that successful bidder is reached. And, as we have before shown, it

is not until then that there is any provision for any further offering for sale, and then only in the case of a failure to file the bond within the time. And the only alternative to offering it for sale again, is that in the discretion of this governing body, it may be granted to the next lowest bidder. There the language excludes any further bidding except upon its being again offered, but that is not the case with the previous sections nor the previous conditions. And it is upon the interpretation of this clause that the widest differences exist in the interpretation of the statute. The learned circuit judge, after the paragraph which we have last quoted, then declares the various steps for which the section has provided, and arranges them consecutively, and they are as follows:

1. Opening of the sealed bids.

2. Opportunity for further competition in the manner and upon the terms prescribed in the section.

3. Striking off of the franchise to the highest bidder.

4. Allowance of twenty-four hours to the successful bidder to deposit the amount of his bid; and

5. In case such bidder fails to make the deposit, grant of the franchise to the next highest bidder therefor.

Record, pp. 46-47.

The learned judge does not quote the whole of the proceeding which he is assuming took place as the third step in the order. The language of the statute in the place to which he is manifestly referring is,

"is finally struck off, sold and granted * * *

to the highest bidder therefor in gold coin of the United States."

We do not, of course, deny that the statute is, if we look at the terms as they are employed, very difficult of interpretation. Undoubtedly in this section the person to whom it is finally struck off, sold and granted, would appear from the natural construction of the language to be one who might thereafter default in the payment, and the franchise or privilege be granted to the next bidder therefor. But as we have said before, the main intention and purpose of the statute is not obscure. And it never was the meaning of the statute that the franchise should be struck off, sold and granted, until the finally successful bidder has put up the money, and we contend that the bidding is not closed until the money is paid. The statute provides for the disposition of franchises by sale only. That sale must be for cash in gold coin of the United States, and no matter how loosely terms are employed, and how clumsy the literary performance, it is nevertheless obvious that the sale is for cash, and that it meant just what it said, and the twenty-four hour proposition did not destroy its character of a sale for cash, but was simply the prescription by which the statute defined its own term of a sale for cash. Suppose that the twenty-four hour clause had not been introduced, and that the language had been that the successful bidder should thereupon immediately pay the cash in gold coin of the United States. Now, would the true construction of the statute have been altered in the least except as to the meaning of the sale

for cash? And if this provision had been followed by the same terms that immediately follow the twenty-four hour clause, that if he failed to pay it immediately it should be granted to the next highest bidder, would that also exclude any further competition in case of failure? If the one making the highest bid had, immediately after it was struck off to him, said, "Well, I can't pay the money immediately, I shan't be able to produce it for a week hence," would the council then have no power to do anything but grant it to the one who had already bid next to this so-called successful bidder, notwithstanding that half a dozen persons might be standing about the council ready to raise that last bid twenty or twenty-five per cent? The error in the construction of the statute by the circuit court, if there be any, is in assuming that as soon as the highest bid was made after the sealed bids were opened, the statute had put an end to any further competitive bidding. The language does not necessitate such a construction, and the construction does defeat every object which the statute had in view. The court further said, in the opinion, that "the declaration of the council made after Murray's default, that he was a fraudulent and irresponsible bidder, and that his bid was null and void, is an immaterial circumstance. If such an inquiry was authorized, it must have preceded the order striking off the franchise to Murray, since said order necessarily determined the lawfulness of his bid, and there was no power in the council to review said order."

We are not disposed to contend that the council's assertion that Murray was a fraudulent and irresponsible

bidder, and his bid null and void is of any very material consequence. We suppose that the meaning of it was that the council had become aware that it had been the victim of a cheat, that it had suspended the bidding the day before to give space for the payment of the money by one who was nothing but a fraud, and who never had any intention of paying the money, and whose bid itself was a fraudulent device to prevent competitive bidding. If the council had not said so, it would have been admissible to show that that was the fact, provided the fact itself was of any consequence. We submit, however, that the court was mistaken in supposing that the inquiry must have preceded the order striking off the franchise to Murray for the reason that the said order necessarily determined the lawfulness of his bid, and that there was no power in the council to review said order. The provisions of the statute were evidently overlooked by the court upon this question of responsible bidders. The word "responsible" with reference to these bids does not occur except with reference to those who bid before the council after the bids are opened. Section 5, after saying that the franchise shall be granted to the person firm or corporation who shall make the highest *cash bid* therefor, then says,

> "provided only that at the time of the opening of the said bids any *responsible firm or corporation present or represented*, may bid for such franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor," etc.

And the statute has not anywhere else made the council the judge of responsible bidders, or given it any dis-

cretion as to the reception of bids that come in as sealed bids. And in this particular case the very existence of this Murray bid, shut off any bid from any person whom the statute required to be responsible, and the statute literally construed left the council in such case nothing to do except to strike off the franchise to this highest bidder, and the councilmanic proceeding subsequently with reference to Murray's bid was nothing more than a declaration of that which is now confessedly true, namely, that this fellow Murray didn't bid at all; that he put in before the council a fraudulent pretended offer to purchase this franchise for $415,000, and that his doing so was a device of other parties who already had bids in there, resorted to for the very purpose of defeating the right of the city and of the public generally to competition before the council as manifestly intended by the statute, and without any intention or any thought ever having crossed his mind of paying that sum, or any part of it. In other words, he wasn't a bidder at all. He was simply a man of straw in the hands of the Traction Company who was handling three bidders to accomplish its own fraudulent aims, and the very fact that the president of that company had put in a bid of $37,500 is strongly suggestive of what we have before conjectured, that but for the appearance of the Pacific Electric Railway in the case on the succeeding day, that company, the Traction Company, would never have paid the $139,000, nor offered to pay it.

Now, if the construction of the court below be the true one, then here the bidding has been closed by a fictitious proposal of a mere dummy in the hands of

those who were otherwise competing in the same bidding and designed to prevent any competition with the only person who was bidding at all on that side, namely, the Traction Company.

The bill alleges and the demurrer admits that in truth and in fact the bid of William S. Hook and the bid of E. A. Davis and the bid of E. Murray, were all on behalf of the Los Angeles Traction Company.

Trans. pp. 13-14, par. XVII.

And it is respectfully submitted that ingenious and able as the argument of the learned judge of the circuit court in support of the construction adopted is, it is not conclusive, and that the construction is erroneous, and is one by which a fraudulent device not only triumphs over integrity and fair dealing, but defeats the plain objects of the statute, and does give effect to a trick hatched out by ingenuity brooding upon fraud with the very intent to circumvent competition and defeat the very statute under which it was pretending to act. Once more we assert that the language which even admits of such a construction should not only be consistent with the interpretation, but exclusive of every other, and that it is well nigh impossible for it to be exclusive of any other, since it cannot be imagined that a legislature is deliberately framing a law and providing for its own circumvention. And as the object of all rules of interpreting statutes is to reach the intention of the legislature, it is impossible to impute such intention to the legislature. And if it be said that the construction is not the result of the presumed intention of the legislature, but results mere-

ly from an inadvertent omission of the legislature, we answer that unless absolutely driven to the conclusion we are not to suppose that there is any such omission. And while it may be true that no legislative ingenuity may be sufficient to exclude all possibility of deceit and fraud, yet the trick here resorted to is too obvious to be overlooked by the legislature, and if its success is possible under the language of the statute, it has not been because the legislature was oblivious to the possibility of such an attempt, but because the language of the act has not been sufficiently explicit to express the mind of the legislature. But the intent is plain, and should be carried into effect if the language will possibly admit of it.

Of course we do not dispute the proposition that where the provisions of a statute are susceptible of but one interpretation, that sense must be accepted, no matter what the consequences may be, but an interpretation of a statute which must lead to consequences which are mischievous and absurd, is inadmissible if the statute is susceptible of another interpretation by which such consequences can be avoided.

Suth. on Stat. Construction, Sec. 238.

Furthermore, in determining the meaning of any particular provision it is necessary to consider the entire statute, and we must proceed in the construction of the statute exactly as we should with any other proposition, and construe it with reference to the leading idea or purpose of the whole instrument. The general intent must be kept in view in determining the scope and meaning of any part. This survey and comparison

are necessary to ascertain the purpose of the act, and to make all of its parts harmonious. They are to be brought into accord if practicable, and thus if possible give a sensible and intelligible effect to each, in furtherance of the general design, and each should be so construed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose. If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature.

Id. Sec. 239.

And Mr. Sutherland, in the section last cited, quotes the following from Pollock, C. B., in Attorney General vs. Sillen, 2 H. & C. 515:

> "To discover the true construction of any particular clause of the statute, the first thing to be attended to, no doubt, is the actual language of the clause itself as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses may reasonably and obviously be drawn. * * * If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

Mr. Sutherland also well expresses the general principles of interpretation, and especially the importance of keeping in mind the main intent of the statute, and of construing all of its particular provisions as having been designed to accomplish that general intent, and the effect which this principle has on the interpretation of the various clauses of the statute. The presumption is that the lawmaker has a definite purpose in every enactment, and has adopted and formulated the subsidiary provisions in harmony with that purpose; that they are needful to accomplish it, and that if they have the intended effect, they will at least conduce to effectuate it, and that general purpose is an implied limitation on the sense of general terms, and a touchstone of narrower terms. It gives sense and scope to the minor provisions, and from this assumption the general rule that the cardinal purpose is that all the parts be treated as a whole, that they are to be brought into harmony, if possible, and so construed, but if a word in the statute should make the clause in the statute in which it occurred unintelligible, the word should be eliminated, and the statute read without it.

Id., Sec. 240.

Words and clauses in different parts of the statute must be read in the sense which harmonizes with the subject matter and general purpose of the statute.

No clearer statement, says Mr. Sutherland, has been, or can be made of the law as to the dominating influence of the intention of the statute in the construction of all its parts than that which is found in Kent's Commentaries:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the text; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed, according to what is consonant with reason and good discretion."

Sutherland continuing says that if, upon examination, the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. But to warrant the change of the sense according to the natural reading to accommodate it to the broader or narrower import of the act, the intention of the legislature must be clear and manifest. The application of particular provisions is not to be extended beyond the general scope of a statute unless such extension is manifestly designed. Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of. The mere literal construction ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better ef-

fected, the law requires that construction to be adopted. The intention of an act involves a consideration of its subject matter, and the change in, or an additon to the law which it proposes; hence the supreme importance of the rule that a statute should be construed with reference to its general purpose and aim.

Sutherland, Sec. 241.

This is followed by many illustrations of the application of these principles to the interpretation of statutes, and in many of them the court reached results which were of far greater deviation from the mere dictionary meaning of words than any that we have suggested in this case. In one of them the effect of this comparison with the context led to the conclusion that birds were not live animals. Reiche v. Smythe 13 Wall. 162. In another case a minor with living parents was held to be an orphan, Ragland v. Justices, 10 Ga. 65, 71. A jury was construed to mean one or more credible and disinterested persons sworn by an officer executing a writ of replevin to testify to the value of property, Williams v. McDonald, 3 Pinney 331.

Sutherland, Secs. 242-244.

The natural import of words is their literal sense but this may be greatly varied to give effect to the fundamental purpose of a statute. In construing statutes courts look at the language of the whole act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act they can collect from the more large and extensive

expressions used in the other parts the real intention of the legislature, it is their duty to give effect to the larger expression.

Sutherland, Sec. 245.

The mere literal construction of a section in the statute ought not to prevail if it is opposed to the intention of the legislature, *apparent by the statute*, and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. General words or clauses may be restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the action or word they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated.

Sutherland, Sec. 246.

Innumerable authorities are cited by Mr. Sutherland for these various propositions, but we suppose that really no authority was necessary, since the rules which are laid down are elementary, and these particular sections have been cited mainly because they express as clearly the rules upon which we rely and their applicability to the present case as they can be found expressed anywhere, and more than that, they

mark the different points of view from which these provisions of the statute under consideration have been regarded by the court, and counsel for the appellee, and those upon which we insist. Of course if we are mistaken in our main proposition, that mistake will go far to remove the force of these rules of interpretation. But it is again respectfully submitted that the legislature has not left its main purpose, its general intent, in the least obscure. This statute marked by a series of phrases, and in different provisions, that the legislature was providing for the sale of franchises to the highest bidder for cash in gold coin, and the sale conducted in such a manner as that there should be a fair competition between bidders, and unless the terms of this statute are such that it has so distinctly marked that the bidding shall be stopped at the perpetration of a trick by a common cheat, although the result is to defeat every object of the statute, no matter how clearly expressed, then we submit that the interpretation given by the learned judge of the court below is a mistake. But what we contend for, is that such a conclusion can only be warranted by language of the overwhelming force which the learned judge of the circuit court thought should be given to the language in this section 5. That is to say, it is so clear, so explicit, that it not only suggests at once the construction which was given to it by the circuit court, but absolutely excludes every other possible interpretation. Even then, we reiterate that it is, to say the least of it, questionable whether the meaning would not be so absolutely repugnant to the plain intent of the

statute as to justify the court in forcing a construction upon it consistent with that main intent. Courts have, as is shown by Mr. Sutherland, and examples of it could be multiplied *ad infinitum*, absolutely rejected words, the meaning of which were too plain and too exclusive to admit of any other interpretation, but for the very reason that they made shipwreck of the plain purpose of the statute, they have been ignored and rejected altogether, and the statute read as though they were not there. And it is submitted to the court that we are here confronted wtih a statute the object of which is plain, the intent unmistakable, and without language that necessitates the absolute defeat of that intent and purpose, and that the appellant in this case complied with every provision of the statute. The application was for the sale of the franchise, the council exercised its discretion and advertised it in the manner prescribed by the statute, the bidding took place fairly and openly as soon as the obstacle to competitive bidding before the council was removed, and which obstacle consisted of the insertion of a fraudulent bid of a straw man, and that the bid made by the appellant was accepted by the council, the cash in gold coin paid into the treasury of the city with the sanction, and under the direction, of the council itself, and thereupon the franchise was finally struck off, sold and granted to the appellant, and within the time prescribed by law it presented a bond in the amount, with sureties approved by the council, and under its direction filed in the archives of the city. That thereupon everything was done which under the statute was required to be done in order to vest the title of the property thus

sold, in the appellant, and that the acts of the council pretending to vacate and set aside that grant, and to offer the property again for sale, and to employ the entire police force of the city in a forcible resistance to the exercise of the franchise which had been granted, were in violation of the constitution of the United States.

As we have before shown, the council of the city was vested with precious little discretion in the administration of this act. When the application was presented to it not being accompanied by the petition mentioned in section 2 of the act, the council did have the discretion of advertising it or not, as it saw fit, but it exercised this discretion, and having once exercised it, the discretion was exhausted.

Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 32.

But it had no further discretion under the act until the money was paid, the franchise granted, and there was a failure to file the bond, which contingencies never occurred in this case, and therefore, the council never had any further discretion in the matter. It had no power to reconsider its action for any cause, whether a veto of the mayor or any other thing. And if the granting of this franchise to the appellant was not absolutely void for the want of power, all action of the council taken for the purpose of reviewing or rescinding its action, or attempting to interfere with the exercise of the privileges granted, was without any authority whatever.

To our minds the opinion of the learned judge of

the circuit court upon the question considered and decided by that court has presented the case of our adversaries in its strongest possible light, and that decision fortified by an argument to which no additional strength can be given, upon that question, nor the cause of our adversaries put in any stronger light upon any other question, and it is for this reason that we have devoted so much time and space to the question decided by the circuit court.

But, nevertheless, as the other questions argued by them are still debatable in this court, we shall now give some consideration to such of them as appeared to be most strongly relied upon in the court below.

The question presented by the demurrer for uncertainty in the bill, raised by the city and its council and mayor, we scarcely think requires any reply other than the bill itself. The ground of demurrer is that it cannot be determined from the bill what number of franchises is embraced in the notice of sale set forth in paragraph XII of said bill, whether one or more and that it cannot be determined what number of franchises were offered for sale, sold or granted by the sale pursuant to the notice of sale. To which we answer the notice of sale is set forth in the bill in full [Record pp. 6-13, par. XII]. Being set forth in full, the question of whether or not there was more than one franchise offered would seem to be determinable from the notice itself, and to be a mere question of law, and not of fact, and that any attempt by the complainant to enlighten the city and its officers, and its council and mayor upon this subject would be simply the expression of the complainant's legal opinion which,

however luminous for other purposes, would, in legal contemplation, add nothing to the force of the bill as a pleading. Nor do we see that it makes any difference whether the notice contains one or more franchises. The first section of the act provides that every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, or lay gas pipe for the purpose of carrying gas for heat and power, etc., along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted, etc., shall be granted upon the conditions in this act provided, and not otherwise.

Now we do not suppose that this act is to be construed so narrowly as to mean that in granting a franchise for any of these things say for the purpose for which the present application was made, operating a street railway, means that every time a corner is turned that a new franchise arises, and that they must be sold separately, nor that the statute was meant to confine the sale of the franchise to a single franchise of a particular kind. It has been said that the right to dig up the streets of a city for any purpose is a franchise. That the right to construct a railway thereon is a franchise, that the right to operate a street railway or any other, and to take tolls therefor, is a franchise. And so there are many others, and several of them are necessarily included in the construction and operation of a street railway, and to suppose that the legislature meant by the employment of the singular number here to limit the sale to a single franchise, and when it was said, "upon any street" in the city it meant that it

must be confined to one street, or every time it entered upon another there was a new and additional franchise requiring a separate advertisement and sale, is another method of construing the statute by which it becomes purposeless and absolutely impossible of any practical application to anything.

It will be noticed, too, that this uncertainty is pleaded only by the city and its mayor and council, the council being the very body that prepared the notice and published it, and the mayor the officer who assumed to veto it. The Traction Company, who had three different persons bidding on this franchise in its own interests, did not discover any such uncertainty in it, and do not demur upon that ground.

Trans., pp. 32-33.

It was not too uncertain for the council to offer it for sale, nor to prevent the Traction Company from entering into competition for the purchase of it, nor even to take pains to prevent others from competing with it. Nor was the objection considered by the circuit court as worthy of any mention, nor do we think that that particular objection is of any consequence here.

But it was claimed in the court below by the appellees that in our statute to a valid grant under the laws of the state of California, a valid ordinance granting the same was necessary, and that that ordinance must be approved by the mayor. That an ordinance was drafted in this case, and passed by the council, and was vetoed by the mayor, and that hence no rights ever accrued to the appellant under the said proceedings.

The particular provisions of the charter of the city of Los Angeles, so far as necessary to an understanding of the question involved here, are the following:

In section 12 of Article III, it is provided: "All legislative power of the city is vested in the council subject to the power of veto and approval by the mayor as hereinafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion."

In section 16 of the same article, it is provided that no ordinance shall be passed or other act done granting a franchise * * * unless two-thirds of the members of the whole council vote in favor thereof.

Article 3, sec. 16.

It is further provided that upon the granting of franchises a journal shall be kept, and the ayes and noes taken.

See Stats. of 1889, page 462-463.

Sections 37 and 38 of Article III are as follows:

"Sec. 37. Every ordinance which shall have been passed by the council shall, before it becomes effective, be signed by the city clerk or other person authorized by the council to sign the same on its behalf, and be presented to the mayor for his approval and signature, if he approves it; if not, he shall indorse thereon the date of the presentation to him and shall return to the city clerk with his objections in writing. The city clerk shall indorse thereon the date of its return to him, and shall, at the first meeting of the council thereafter, present the same, with the objections of the mayor, to that body. Thereupon the council shall proceed to reconsider the passage of the

ordinance. Upon such reconsideration, in all cases where the votes of two-thirds of the whole council are required to pass the ordinance in the first instance, it shall require the votes of three-quarters of the whole council to pass the ordinance over the mayor's veto. In all other cases it shall require the votes of two-thirds of the whole council to pass the ordinance over the veto. The vote in all cases of reconsideration, shall be by ayes and noes, and the names of the members voting for or against shall be entered upon the journal.

"Sec. 38. If any ordinance shall not be returned to the city clerk by the mayor with his objections in writing, within ten days after it shall have been presented to him, it shall become effective and be as valid as if the mayor had approved and signed it."

Stats. of 1889, p. 465.

Now, turning to the act of 1901, we say in answer to the proposition that the mayor had anything to do with it, that the statute excludes the possibility of any such a construction. The very first section says that every franchise or privilege, etc., shall be granted upon the conditions in this act provided, and not otherwise. It will thus be seen that when the conditions arise, the council itself has no option, no discretion, in the matter. It then prescribes the procedure. The first step is an application. If this application is unaccompanied with a petition signed by the owners of three-fourths of the frontage of the real property along the route of the franchise, praying that the same be granted, then the governing body has a discretion, but that discretion is simply whether or not it will grant the franchise at all. There the statute says that it shall, in its

discretion, and when the application is accompanied by this petition, it must advertise the fact of the said application, together with the statement that it is proposed to grant the same, etc.

See sec. 2 of the act.

Here is the only discretion allowed the council at all, until after sale, and this application not being accompanied with such a petition, it was in the discretion of the council to refuse to advertise the same at all, but it exercised its discretion by advertising the franchise for sale. Having done so, one of the very things which they were required to state in that advertisement, and which they did state, was that bids would be received and it would be awarded to the highest bidder, and that the franchise would be granted to the person, firm or corporation who should make the highest cash bid therefor.

See sections 2 and 5 of the act.

And the act itself declares that the franchise or privilege shall finally be struck off, sold and granted by the said governing body to the highest bidder therefor, in gold coin. That if the first of the highest bidders did not pay within twenty-four hours it should be granted to the next highest bidder therefor. If the bond were not filed, the award shall be set aside.

Now, between the presentation of the application and this point, no discretion has been left to the council at all.

The next and last place where the council has any discretion is when the money has been paid, and the bond has not been filed within the time. Then again

it may grant it to the next lowest bidder, or again offer it for sale at its discretion.

It is absurd, we submit, to say that the mayor had the power to forbid the council's doing a thing which the legislature said it should do, and forbid it, too, when the very conditions upon which it became the legal duty of the council to do the thing had actually occurred, and those conditions must always have arisen before the right of approval or disapproval of the mayor arose, if he had such right. And thus this argument means that the legislature says you shall, but the mayor may say that you shall not. There is nothing in the act from which any such inference could arise.

But again. Section 37, which gives this veto power, also states the manner in which he shall exercise it. And section 38, already quoted, declares that if the mayor do not return it with his objections in writing within ten days, it shall become valid and effective as though he had approved it. In other words, the veto power given here follows the general rules found in the constitution of the United States, and of the various states of the Union, namely, he has ten days within which to exercise it. But the statute of 1901 requires that it shall be struck off, sold and granted, as we contend, immediately upon the payment of the money, and if not at that time, then at a still earlier time, namely, immediately, upon the highest bids being made, and the money is to be paid within twenty-four hours, and the bond filed within five days after the award, so that under any construction, no more than six days can intervene between the striking it off and

the taking of the final step by the purchaser by which his title becomes absolutely vested beyond the right of anybody to interfere. Yet, according to the charter the mayor may brood over this matter for ten days before exercising his alleged right to veto.

Furthermore, there is no uncertainty as to what the act means with reference to the tribunal which is to make this sale. Every franchise, etc., proposed to be granted by *boards of supervisors,* boards of trustees or common councils or other governing or legislative body of any city and county, city or town, within this state, etc.

Now, these terms manifestly were employed with reference to these political corporations in the state of California. The city of San Francisco is a combination of a city and county government, and its corporate name is, the City and County of San Francisco, and its legislative body is called a board of supervisors. And this statute evidently has reference to this city and county government, and its legislative body of a board of supervisors.

The next name of the legislative body is, boards of trustees, a very common name in this state, as is also common councils, and the council of the city of Los Angeles was for many years known and called the "common council," but now it is called the "council" merely. And thus the legislature, after employing these more common terms, in order to embrace others by whatever name they might be called, said, other governing or legislative bodies. It was therefore referring to these boards of supervisors and boards of trustees

and common councils as the governing or legislative body.

The second section provides that an application for any franchise or privilege shall be filed with the governing or legislative body of the municipality, and thereupon said governing body shall, in its discretion etc. Here again it is obvious that the governing or legislative body, and the governing body, were used by the legislature in exactly the same sense, and to mean the same thing, and did not include the mayor. The title of the act is, "An Act providing for the sale of street railroads and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts."

And, as already stated, in the very first section it mentions by name certain tribunals which it is evidently regarding as the legislative or governing body.

No reason that we have discovered exists for supposing that the terms used in this act, "legislative or governing body" or any of the other phrases which it has used to express the same thing, were used in one sense in one part of the act and another in any other. It is evident that the terms are used in the same sense all the time. When it is said that "the application for any such franchise or privilege shall be filed with the governing or legislative body," it is manifest that the mayor is not included. And when a discretion is given to the governing body as to advertising the fact of said application, it is again perfectly plain that the mayor is not included, and when, as we proceed, we find specific directions govern-

ing the action of this body, whatever it may be, down to and including the actual striking off, selling and granting the franchise, all of which said acts are to be done by this governing body, and in which, as we have repeatedly said before, it had no discretion after once entering upon the advertising of the franchise, it is, if possible, still more obvious that no action of the mayor was contemplated by this statute, and to say that after all had been done, the money paid, the bond given, some other and further act by some governing or legislative body which, by a strained construction, is to include the mayor, was necessary to the vesting of this franchise, cannot be wrought out of the language of the act itself. And indeed, as we understand our adversaries, they do not seriously claim that this statute, if read alone, could be so construed, but they tell us that the charter of this city provides that in order to grant any franchise an ordinance is necessary, and that every ordinance must, by that same charter, be approved by the mayor, or if disapproved, passed over his veto in the manner pescribed by the charter. And then we are further told that the charter of the city of Los Angeles, being one which was framed by a board of freeholders under the provisions of the constitution of the state of California, and approved by the legislature, is the law of this city in reference to all municipal matters, and does itself control any general law of the legislature in municipal matters, and therefore that if the act of 1901 is not susceptible of the construction for which we are here contending, namely, that the mayor is not included in the term "governing

body," then the statute is, so far as the city of Los Angeles is concerned, void.

But before passing to this last question, we call attention to the case of Jacobs v. Board of Supervisors, 100 Cal. 121. In that case the board of supervisors of the city and county of San Francisco, in the exercise of the powers given it by the constitution of the state, had fixed the water rates to be charged in the city of San Francisco by an ordinance passed by the board, and the mayor had vetoed it, and this proceeding was instituted to compel the board of supervisors, by a writ of mandamus, to proceed to act upon the mayor's veto, and if they didn't pass the ordinance over his veto, then to proceed to fix the rates. The provisions of the constitution upon which the determination of the question there involved depended, are contained in Article XIV of the constitution of the state of California. In section 1 of this article it is declared:

> "The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to the regulation and control of the state in the manner to be prescribed by law; provided that the rates or compensation to be collected by any person, company or corporaton of this state for the use of water supplied to any city and county or city or town or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordi-

nances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary within such time shall be subject to a peremptory process to compel action at the suit of any party interested and shall be liable to such further processes and penalties as the legislature may prescribe."

The remainder of the provision declares the forfeiture of the works to the city for collection of rates other than those so fixed, and in the case of Jacobs against the Board of Supervisors, *supra*, the supreme court said:

> "A constitution," said the court, "must be read, interpreted and expounded in the same manner by the same means and methods, which are appropriate to all other legislative acts. * * * Now it is clear that there should be no such a construction of language as would lead to absurd or impracticable results, or compel a court to decree a thing substantially impossible, or which is in plain violation of fundamental principles of law or equity firmly established and universally recognized, unless such language absolutely requires such construction. The judgment in the case at bar first commands appellants to act upon the objections of the mayor which we presume means to vote formally on the question whether the veto should be sustained; and then assuming that there may not be nine votes in favor of the order, commands them forth-

with to proceed to fix the rates. If they should vote on the veto and a majority of the supervisors, but not nine, should vote for the order, of course under the judgment they would be compelled to proceed and pass another order and if that should be vetoed with the same result, then another and another, and so on indefinitely. So that if the board should not yield its views to those of the mayor there could be no legal fixing of water rates at all. But the section of the constitution in question provides that the water rates *shall be fixed annually*, to commence on July 1st and that any board or body failing to do so shall be subject to process to compel action, and that any person collecting water rates otherwise than so fixed annually shall suffer certain penalties and forfeitures. If such a construction does not involve a palpable absurdity or an attempt to accomplish an absolute impossibility it certainly does lead naturally and probably to what is substantially impracticable and to a failure to consummate the constitutional provision under review."

100 Cal. 127-128.

The argument here made against the existence of the veto power of the mayor upon an ordinance fixing the water rates applies with tenfold force against the existence of any such veto power by the mayor in the present case. In fixing water rates the board of supervisors are invested with a discretion. Indeed, subject to certain well known limitations upon the power, the rate to be fixed is absolutely within the discretion of this tribunal, whatever it may be that is clothed with this power, yet nevertheless the consti-

tution said that they should fix a rate, and that it should go into effect on the 1st of July, and that if they didn't fix the rates in February, they could be made to fix them by the writ of mandamus. But, as we have before said, there was no discretion in the council of the city of Los Angeles or any other municipality in this state, except that discretion which we have so often referred to, and when the council exercised its discretion it was, as we have shown, exhausted, and thereafter it was to proceed, not according to its discretion, but the various steps to be taken by the council were determined by the statue itself, and the council was left no discretion at all, and we are not to construe the statute in such a manner as to lead to absurdities, and to suppose that they are required to go through the absurdity of submitting to the mayor for his approval that which the legislature itself had already determined, and to say that the mayor must stamp upon it his consent in order that it should have the operation which the statute said that it shall have, is nothing more or less than an absurdity.

Now, the claim that under the interpretation which we have here suggested, the act is in violation of the constitution of the state of California, and void, is wrought out of the provisions of the constitution of the state of California, and the charter of the city of Los Angeles framed as it was by a board of freeholders. The provisions of the constitution out of which this conclusion is reached are the following:

> Article XI, Sec. 6: "Corporations for municipal purposes shall not be created by special laws; but the legislature by general laws shall provide for the incorporation, organization and classification in proportion to population of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to, and controlled by, general laws."

We have underscored the words "except in municipal affairs" for the reason that this was introduced into the constitution by the amendment adopted November 3, 1896. Prior to that time this exception did not exist, but it was declared generally that "all charters thereof framed or adopted by authority of this constitution shall be subject to, and controlled by, general laws."

The next provision, and one of great importance in the argument of counsel for the appellees, is section 8 of article XI. This section has undergone many changes. It originally provided that a city containing a population of more than one hundred thousand inhabitants might frame a charter for its own government, but now it is declared:

> "Any city containing a population of more than three thousand five hundred inhabitants may frame a charter for its own government, consist-

ent with, and subject to, the constitution and laws of this state, by causing a board of fifteen freeholders who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy to the mayor thereof or other chief executive officer of such city, and the other to the recorder of the county. Such proposed charter shall then be published in two daily newspapers of general circulation in such city for at least twenty days * * * provided that in cities containing a population of not more than ten thousand inhabitants, such proposed charter shall be published in one such daily newspaper; and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or ratification as a whole, without power of alteration or amendment. Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or if such city be consolidated with the county, then of such city and county, and shall become the organic law thereof, *and supersede any existing charter* and all amendments thereof, and all laws inconsistent with such charter. A copy of such charter certified by the mayor or chief executive officer,

and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its ratification by them, shall, after the approval of such charter by the legislature, be made in duplicate and deposited, one in the office of the secretary of state and the other, after being recorded in said recorder's office, shall be deposited in the archives of the city, *and thereafter all courts shall take judicial notice of said charter.* The charter so ratified may be amended at intervals of not less than two years by proposals therefor submitted by the legislative authority of the city to the qualified electors thereof at a general or special election held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter. In submitting any such charter or amendments thereto, any alternative article or proposition may be presented for the choice of the voters and may be voted on separately without prejudice to others."

In 1888 a board of freeholders chosen by the electors of the city of Los Angeles in the manner here provided in the statute, and consisting of fifteen members, prepared a charter for the city of Los Angeles, which was submitted to the electors of the city, and approved by them, and on the 31st day of January, 1889, the charter was approved by the legislature of the state of California, and is set forth in the statutes of 1889, pages 456-512.

In Article III the charter deals with the powers and duties of the council.

Section 12 of this article [Stats. of 1889, p. 462] has already been set out in this brief. It is the section by which it is declared that all legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, and it will be seen that by the provisions of this section the mayor is not made a part of the legislative power, but the full extent of his powers or duties with respect to legislation is simply that of the exercise of a veto.

Section 15 of Article III provides that the enacting clause of all ordinances shall be substantially as follows:

The mayor and council of the city of Los Angeles do ordain as follows:

Section 16, Article III, statutes of 1889, page 462, is as follows:

> "Six members of the council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done, granting a franchise, making any contract, auditing any bill, ordering any work to be done or supplies furnished, disposing of or leasing the city property, ordering any assessment for street improvement or building sewers, or any other act to be done involving the paying of money, or the incurring of debt by the city, unless two-thirds of the members of the whole council vote in favor thereof. All other ordinances may be passed by vote of a majority of the whole council."

The number of councilmen in this city is nine, so that it will be observed that under the charter provi-

sion it requires a two-thirds vote to do the things mentioned in this section 16.

Section 37, which provides that every ordinance which shall have been passed by the council shall, before it becomes effective, be signed by the city clerk and presented to the mayor for his approval or signature, we have already quoted in full. And also section 38, which provides that if the ordinance is not returned by the mayor with his objections in writing within ten days, it shall become effective and be as valid as if the mayor had approved and signed it.

From these various provisions it is argued that the granting of franchises under this act of 1901 is a municipal affair; that by the provisions of the constitution of the state of California the charter of the city of Los Angeles is not controlled or affected by acts of the legislature so far as municipal affairs are concerned, but on the contrary the charter itself is controlling; that hence in the granting of the franchise here provided for, our charter declares that it could only be by ordinance, and that the mayor possessed this veto power, and that so far as the mode of making the grants is concerned, we are to look to the provisions of the charter, and not to those of the general law, and that, as it is shown by the bill that this franchise never was granted in the mode prescribed by the charter, no rights ever vested in the appellant in or to the rights, privileges, franchises and property purporting to have been struck off and granted to it as hereinbefore set forth, and if, upon the face of the act of 1901 it appears that this peremptory mandate that

the governing body shall finally strike off, sell and grant to the successful bidder the franchises advertised are so essentially connected with, and inseparable from, the provisions of the act for the disposition of the franchises referred to therein that it cannot be supposed that the legislature would have passed the act except with that provision, then the act is, at least so far as the city of Los Angeles and other municipal corporations having freeholders' charters directing some other mode of granting franchises are concerned, in violation of the constitution of the state of California, and void. But it is submitted that this is a mistake. The charter of the city of Los Angeles does not give to the city of Los Angeles the power to grant a street railway franchise at all, and what is more, such a power never was vested in the city by any act of the legislature that ever was passed. All the power that this city ever possessed to grant a franchise came, not from any provisions of the city charter, either the present or any previous one, but it came from the general laws of the state enacted by the legislature. It was contended in the court below by counsel for the appellees, that the city of Los Angeles, through its general supervisory powers over the streets and its general municipal powers under the charter of 1889, had the power to grant franchises for street railways or to refuse to grant them; to permit the streets to be thus occupied or refuse to permit it. But, as above stated, the claim was that this resulted impliedly from the power of the city over the streets. It is not denied that the charter of the city doesn't itself contain any provisions concerning street rail-

ways at all. No power is given the city by any express terms of the charter to make any such a grant; nor is that power contained in the charter at all unless it be through this general power over the streets, or some other equally general grant of power.

Prior to 1901 the legislature had passed some laws making provision for the disposition of franchises of this character in a somewhat similar manner to that prescribed in the statute of 1901, but these statutes were all of comparatively recent date. Prior to these particular statutes, all the power that existed anywhere except in the legislature itself, to grant street railway franchises was contained in the Civil Code of California which was originally adopted in 1872, and took effect for the most part on the 1st day of January in 1873. The provisions referred to were contained in sections 497-511 of the Civil Code, and were part of the chapter on corporations.

Now one of the reasons which, in the court below, was urged for the invalidity of the grant which is here in question, was that at one place in this franchise, it assumed to authorize two corporations to occupy the same street or track for more than five consecutive blocks. But the only reason why that fact, if it were true, would have any effect upon the franchise, is that the Civil Code, section 499, declares that two lines of street railway operated under different managements might be permitted to use the same street or track, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly, but in no case must two lines of street rail-

way operated under different management, occupy or use the same street or tracks for a distance of more than five blocks consecutively. That section of the code was amended on February 25, 1891, two years after the adoption of our charter. To be sure, upon the face of this record as it appears here before this court, the ground upon which this contention was based does not appear, but was contained in the affidavits upon the injunction, and we only referred to it for the purpose of showing that the counsel for the appellees themselves are not fully persuaded of the correctness of their position with respect to the effect of the constitution acting upon a freeholders' charter, upon this particular statute, for, according to their argument, the freeholders' charter approved by the legislature, repeals all laws inconsistent with it, and so the Supreme Court of California has decided, and indeed the constitution practically says so. And more than that, the general laws with respect to municipal affairs are controlled by the charter so that if it were true that this particular franchise did contain any such authority for two lines of street railway operated under different management, to use the same street or track for more than five blocks consecutively, it would, if these general laws were repealed, be a matter entirely irrelevant, for, as already stated, this prohibition is contained in the Civil Code of California, and not in the charter of the city of Los Angeles, and the very argument assumes that the acts of the legislature providing for the disposition of street railway franchises were not repealed by the charter, nor

controlled by it. Take away section 499 of the Civil Code, and there is nothing in the laws of this state that put any limitation upon the right of different street railway corporations to occupy the same street or track for twenty-five consecutive miles if they saw fit.

But turning now more particularly to the provisions of the constitution and of the charter, it is submitted that when the constitution as amended on November 3, 1896, declared that all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, should be subject to, and controlled by, general laws, it does manifestly appear that the words "except in municipal affairs" were used to express some idea in the mind of the legislature as to what municipal affairs are. In other words, the very manner in which the sentence is constructed shows conclusively that the constitution was not assuming to define what are, and what are not, municipal affairs. The constitution does contain a provision that any county, city, town, or township may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with general laws. (Constitution, Art. XI, Sec. 11.) But it nowhere says anything about the powers of municipal corporations created in this manner, nor anything about them at all except the general provision about the local police and sanitary regulations, and as to that, it will be observed the power of the constitution is not limited to cities with freeholders' charters, but they apply to all alike. Hence, with that exception (if it be an exception) the constitution says

nothing about what the powers of the city shall be, nor what this charter shall contain. And the city has only such powers as are conferred upon it by the sovereign, no matter how its charter may be framed.

Now it will be noted that the constitution does not define the expression "except in municipal affairs," nor give the least hint as to the meaning other than that which is conveyed by the words themselves. It is not to be believed that the constitution was either coining a new phrase, or using an old one in some sense peculiar to the constitution itself. It could not have been imagined by the makers of that instrument that the interpretation of those terms could be other than, or different from, the interpretations which had already been put upon such phrases, or that it related to anything else than those affairs which had been theretofore regarded as coming within the meaning of that term. The expression is used as though it were a phrase well known, and with a meaning fixed. It may be unfortunate that some pains were not taken to express more clearly just what was intended, for the phrase is one which is difficult of interpretations for reasons which have been given by the Supreme Court of California, whose particular function it is to construe this constitution.

In Fragley v. Phelan, 126 Cal. 383, Mr. Justice Garoutte, after stating the manner in which the question arose, said:

> "The solution of the questions thus presented largely revolves around the words 'except in municipal affairs' as these words are used in the constitution of the state. The phrase formed by

these words has a meaning, and a most significant one. This is apparent when we pause a moment to consider that this single phrase forms the subject matter of an amendment to the constitution of the state. The relationship existing between a state and its municipalities is so close that it may be said that every city ordinance and every state statute is a matter of interest to both state and municipality. It may be said that all state affairs are a matter of substantial interest to the municipality, and that likewise all municipal affairs are a matter of concern to the state. Yet those interests are incidental and indirect, and the meaning of this phrase necessarily takes a narrower scope. Indeed, in the very wording of the constitutional provision itself, we find that all matters of legislation pertaining to, and bearing upon, municipalities, do not come within the significance of the words 'municipal affairs' as used in the constitution. A mere glance at the provision demonstrates this fact. The constitution provides that cities and towns, 'except as to municipal affairs' shall be subject to, and controlled by, general laws. It is here plainly indicated that a vast amount of legislation pertaining to cities and towns does not come under the classification of 'municipal affairs.' "

There were several opinions by different judges in that case, and we invite attention to all of them. They are too long for quotation. And all taken together, doubtless do not furnish us with a very satisfactory explanation of the meaning of this term. But what we call particular attention to is that the court does assume that the legislature, when it proposed this amendment,

and the people in adopting it, had in their minds a something which was embraced within the designation of the phrase "municipal affairs," and that that term did not necessarily include all things which might be subjected to the power of the municipality. In some portions of the opinions in this case last cited, it would seem that some of the justices, or one at least, supposed that the meaning might be that whatever the municipality should, by its charter, be given the jurisdiction over, did, by that act, become a municipal affair. But such a construction cannot be allowed because that is to destroy the meaning of the constitutional provision. It was useless to declare that the charter should be subject to general laws 'except as to municipal affairs" if the very fact that the charter gave the power to the city at once made it a "municipal affair."

In the cases of the Board of Park Commissioners against Council of Detroit, 15 Am. Rep. 202; and People against Hurlburt, 24 Mich. 44, 9 Am. Rep. 103, Judge Cooley enters into a very elaborate discussion of the question of what may be said to be a purely municipal affair, and especially in the case first above cited. In that case it was held that the legislature could not compel the council to raise money to purchase a park contrary to their will, and, generally, that the legislature has not the power to compel the local authorities to levy taxes for a local improvement. Though the city may have the power to provide parks, open or lay out streets, yet whether it will exercise that power and in such a manner as to impose the burden thereof on its own citizens, is a question for its own

determination. And it will be found that in our constitution itself it is provided in section 12 of article 11, that the legislature shall have no power to impose taxes on counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof for county, city, town, *or other municipal purposes,* but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

And in section 13, that the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform *any municipal functions whatever.*

And in section 14, no state office shall be continued or created in any county, city, etc., for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general laws, appoint such officers.

And other special provisions are contained with reference to the conduct of the affairs of municipalities, although doubtless some of the things there treated of would not come strictly within the definition of the term "municipal purposes" as distniguished from the general governmental purposes, and upon matters which affect and interest the people of all localities in a state as well as those who are the inhabitants of these

municipalities. But on the other hand, there are subjects which we see at a glance may be of vital importance in the management of the municipal affairs and property, but in which the general public would not only have no interest, but affecting affairs with which they have no concern. The prescription of fire limits, the regulation of buildings constructed within those limits, regulations for the prevention and extinguishment of fires, and various other matters with which municipalities have to deal, and which are of vital interest to the inhabitants of cities and towns, not only do not concern the rural districts, in many places sparsely populated, but the laws and regulations by which these affairs are governed, are themselves of no interest to other districts.

Now, while the legislature of the state of California in providing general laws for the organization of municipalities, and while the freeholders' charters adopted and approved under the provision of the constitution of California may confer upon the municipal authorities power over many subjects which are not those of peculiar municipal importance, but relate to affairs in which all of the people of the state are interested, yet nevertheless, as to such provisions, general laws passed by the legislature and manifestly intended to apply to them as well as to other districts, will govern and control the charters under the very terms of the constitution itself. And, further, the general principle that municipal corporations have no powers except those which are either expressly conferred or necessarily implied, or necessary to carrying out the powers which are conferred, is a principle as applicable to the free-

holders' charters as to any other. This principle of construction has been applied to this very charter of the city of Los Angeles.

In the case of the Los Angeles City Water Company against the city of Los Angeles, 88 Fed. 729-730, Judge Wellborn, in delivering the opinion in the case, said that these municipalities have only such powers as are granted by the charter, that is to say, such as were expressly granted or necessarily implied, or such as were necessary to the execution of the powers which were explicitly granted. And the charter which was there referred to by Judge Wellborn was this same charter of Los Angeles city, approved by the legislature in February, 1889.

The fact, therefore, that the constitution of this state has prescribed a somewhat peculiar and special mode for establishing charters of cities in this state, and the manner in which they are framed and adopted, and the fact that the authority therefore proceeds from the constitution of the state, does not modify the principle of construction which is here referred to.

All charters of municipalities emanate from the sovereign, and are subject to the same rules of construction, without regard to the manner in which they are framed or adopted.

Now, let it be remembered that the constitution provides that they are to be controlled by general laws except in municipal affairs.

Article XI, Sec. 6.

And when they are approved, they supersede any existing charter, and all amendments thereof, but

they do not supersede the general laws except in so far as they are inconsistent with the charter.

Now a franchise is a privilege emanating from the sovereign. They are not the property of municipalities. The granting of them must proceed either directly from the sovereign authority, or if by any inferior tribunal or political corporation, then the power to grant it must be given by the sovereign, and in this state must either proceed directly from the constitution itself, or where it has made no provision, then the legislature as the representative of the sovereignty of the state, must confer the authority.

A municipal corporation has not, by virtue of the general powers conferred upon it, any authority to grant a street railway franchise.

Mr. Dillon says: "In this section" (referring to section 724 of the 4th edition of Dillon's Municipal Corporations) "and the three following, the author sums up the conclusions to which he has arrived after an examination of all the reported cases upon the subject of railways in streets:

> "1. As respects ordinary railways operated by steam and street railways operated by horses, legislative authority is necessary to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads whose tracks are constructed in the usual man-

ner, and whose trains are propelled by steam. But it is otherwise as respects horse railways; and the ordinary powers of municipal corporations are usually ample enough in the *absence of express legislation on the subject* to authorize them to permit or refuse to permit the use of streets within their limits for such purposes. But they cannot, by an implied power, confer *corporate franchises or authorize the taking of tolls.* This must come from the legislature."

The italics are ours.

Now it is obvious that Mr. Dillon here does not go any farther than to say that under the general powers over the streets, the corporation has the power to permit or refuse to permit a street railway to be constructed. Even that authority comes from the legislature, but may be implied from the general authority of the municipality over the streets. But the power to grant a franchise to construct and operate a street railway and take tolls therefor is not implied from the general power of the city over the streets.

In the 4th subdivision of section 727, he says:

"As special legislative authority is necessary to enable a company to construct a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down."

And he concluded the section by saying:

"The extent of municipal, police and other control over street railways depends, of course,

upon the municipal charter, and the legislation of the state touching the subject."

In State *ex rel* Attorney General against the Cincinnati Gas Light & Coke Company, 18 O. S. 262, it was said that the right to use the streets of a city for such a purpose, whether in the hands of a private corporation or a natural person, is a franchise and as such can only emanate directly or indirectly from the sovereign power of the state.

And this is upon the fact that such franchises as street railway franchises, franchises for laying pipes and supplying a city with gas or water, and various other things, are privileges emanating from the sovereign, and that it primarily belongs to the legislature to make such grants, that while the power may be conferred upon the municipality, yet nevertheless it is exercising the power of the state, and that when a grant is made by the municipality under such authority it is a grant of the state through the municipal authority as its agent.

City of Walla Walla v. Walla Walla Water Company, 172 U. S. 1; 43 L. Ed. 341.

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 Fed. 113.

New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650; 29 L. Ed. 516.

Louisville Gas Co. v. Citizens Gas Light Co., 115 U. S. 683; 29 L. Ed. 510.

City Ry. Co. v. Citizens Street Ry. Co. (U. S.), 41 L. Ed. 1114.

In Mayor etc. of Knoxville v. Africa, 77 Fed. 501,

507, the circuit court of appeals for the sixth circuit, said:

> "Under the well settled law of Tennessee the power to grant to a public corporation a right of way for the operation of public railroads, commercial or street, on or over a particular street or public highway, resides primarily in the legislature of the state, but may be delegated to municipal governments."

Franchises, being sovereign prerogatives, belong to the political power of the state, and are primarily represented and granted by the state.

Fall v. County of Sutter, 21 Cal. 238.

Judge Cooley, in his work on Constitutional Limitations, in the sixth edition, at pages 231-232, said:

> "And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations."

Here we are cited to note 1 at the bottom of page 232, wherein many cases are cited upon this subject, and among others Eichels v. Evansville Street Ry. Co., 78 Ind. 261, and wherein he says that it was held that the ordinary power of the city did not give it authority to grant a street railway franchise.

That case is also reported in 41 Am. Rep. 561-563. And in the case it is distinctly held that the authority to grant the right to lay tracks upon a public street of a city must be conferred expressly or by necessary

implication; that without such a grant the public streets could not be used by a railway corporation for the transportation of passengers for hire; that it was a franchise, and could only exist by the force of a legislative grant; and that they were called upon to decide, not whether the legislature could delegate the power to make such a grant, but whether such a power is embraced within the ordinary and incidental powers usually conferred upon, or possessed by, a municipal corporation; and they held that it was not, and moreover, it was distinctly said by the judge delivering the opinion that he was not speaking of the intersecting and crossing of streets by railway tracks laid down in building lines of road which run through the city, but of railways exclusively doing business in the city, and occupying the streets for that purpose.

See also Louisville & N. R. Co. v. Mobile etc., 4. Mun. Cor. Cases, 562, and the case cited in the note at page 571, Oakland R. R. Co. v. Oakland etc., 45 Cal. 365.

Harrison v. New O. & Pac. Ry. Co., 34 La. 462; 44 Am. Rep. 438-440.

And the note to Cooley, p. 232, where he cites the case of Williams v. Davidson, 43 Tex. 1, where it was held that the power to enact ordinances necessary for government does not authorize the grant of a franchise for a toll bridge.

See also Cooley's Constitutional Limitations, page 239.

In South Pasadena v. Terminal R. R. Co., 109 Cal. 322, it was held that the control of streets by a mu-

nicipality was only a qualified control, and subject to the termination of the authority by the state.

And the case of Philadelphia & Trenton R. R. Co., 36 Am. Dec. 202, 206-210, was cited as authority for that proposition, and in Beekman v. Third Ave. R. Co., 47 N. E. 277, 278-279, it was distinctly held that the authority to make use of the public streets of a city for railroad purposes primarily resides in the state, and is a part of the sovereign power, and the right or privilege of constructing railways on the streets, which, for convenience, is called a "franchise," must always proceed from that source, whatever may be the agencies through which it is conferred.

And in Fanning against Osborne, 102 N. Y. 441; 7 N. E. 307, it was held that the use or occupation for such purposes without the permission or grant of the state through the legislature, constitutes a nuisance which may be restrained by individuals injuriously affected thereby, and that the city authorities have no power to grant the right except in so far as they may be authorized by the legislature, and then only in the manner, and upon the conditions prescribed by the statute.

See further,

Davis v. Mayor *et al.*, 14 N. Y. 506;
Millhau v. Sharn, 27 N. Y. 611;
People v. Kerr, *id.* 188.

Now, as we have already stated, the charter of the city of Los Angeles does not, anywhere, expressly confer any power to grant such a franchise, and the

provisions of the charter from which such a power, it is claimed, may be implied, are the following:

Article I, Sec. 2, declares that

"The said corporation shall have the power:

* * *

"8. To lay out, open, extend, widen, improve or vacate, pave, and repave streets and alleys, sidewalks and crossings, and other highways.

* * *

"12. To manage, control, sell, lease, or otherwise dispose of any or all the property of the said corporation; and to appropriate the income or proceeds thereof to the use of the corporation; provided, that it shall have no power to mortgage or hypothecate its property for any purpose.

* * *

"22 To make and enforce within its limits such other local, police, sanitary, and other regulations as are not in conflict with general laws, and are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants.

"23. To exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated herein or not, except such powers as are forbidden or are controlled by general law."

Stats. of 1889, pp. 456-458.

The provisions of the charter as to the manner of granting franchises, we have already referred to and quoted.

And from these general governmental powers it is claimed that the power to make such a grant may be implied. Such an implication, we submit, is far fetched, and even if it could be indulged at all, the rules of construction to which we have already several times referred, would exclude any such interpretation in this case.

In People v. San Joaquin Ry. Co., 111 Cal. 544, where the act of 1893 providing for the disposition of just such franchises was under consideration, the court, after saying that it could not be denied that the language of the act was broad enough to include the franchise that petitioner sought, said:

> "But a statute will not always be held to include every case which falls within its literal terms; the penalty of death denounced against any person who draws blood in the street is not incurred by a surgeon who bleeds one who has fallen in a fit, and so generally, no law will be so applied as to work a palpable absurdity. The word 'railroad' is certainly broad enough to cover a steam railroad, and the privilege of laying and operating a steam railroad through a city is clearly included in 'any privilege whatever,' but, at the same time, if it is perfectly evident from the whole tenor of this act, and other acts in *pari materia*, that the legislature could not have intended the consequences of a literal construction of the language above quoted, such a construction cannot obtain."

In Laidlaw v. Pacific Bank, 137 Cal. 392, the supreme court held that it was the duty of courts to interpret statutes according to their true intent and

meaning deduced from the whole and every part thereof, taken together, and that the intent so ascertained must prevail over the literal sense of the terms, and control the strict letter of the law when the latter would lead to palpable absurdities.

To the same effect is *Ex parte* Ellis, 11 Cal. 223, 224.

Giving a common sense construction to these provisions of the charter, and indeed to any contained in it from which such an implication could, by any possibility, be supposed to arise, and looking at the previous legislation of the state and the decisions of the courts upon acts of the character now under question, it is obvious that the charter was never intended to confer any such power. As we have already said, the power that the city of Los Angeles or any other city in the state of California ever exercised in the granting of street railway franchises, never came from their charters or any of them; they were always conferred by general laws of the state of California, and did not proceed from charters. Many times the legislature of the state of California has acted directly in making the grant. A number of such legislative acts may be found in the statutes of 1861.

Statutes of 1861, pp. 144, 146, 187, 190, 193, 264, 382, 656.

When the codes were adopted in 1872, and put in effect, the 1st of January, 1873, the general powers upon this subject were contained within the Civil Code, and at the sections to which we have already referred, and this continued to be the authority, and the only

authority which any municipal corporation in the state possessed to make a grant of these franchises until 1893. By the provisions of the Civil Code they were not offered for sale, and the governing body had discretion in making the grant or witholding it.

But in 1893 the legislature passed the first act authorizing the disposition of these franchises in a different manner, and that was a general law applicable to all parts of the state.

Stats. of 1893, p. 288.

This act underwent several changes until there came the act of 1901, under which this controversy arises, and no city in the state has ever assumed to grant a street railroad franchise except in pursuance of these various acts.

In Arcata v. Arcata etc. R. Co., 92 Cal. 639, 644-645, the supreme court of California held that there was no question as to the right of the legislature to delegate to municipal boards the power and discretion to say whether a railroad shall be laid in the streets, and if so, where and under what conditions, and that authority was conferred in the Civil Code, sections 465 and 470. That to be sure was the case of a commercial railway, but the franchises are of exactly the same nature.

Now this case was decided long after the charter of the city of Los Angeles went into effect, and long after the new constitution had taken effect.

In People v. Rich, 54 Cal. 74, it was held that the mayor and common council had no authority to pass an ordinance granting to the defendants the right to

law a street railway track in violation of section 499 of the Civil Code; that is, that a franchise could not be granted for two corporations to occupy the same street or track for more than five blocks.

The same thing was decided in Omnibus R. R. Co. v. Baldwin, 57 Cal. 160.

And that case was decided after the adoption of the new constitution, and the ordinance which was there in question was passed by the board of supervisors of the city of San Francisco.

In Pacific Ry. Co. v. Wade, 91 Cal. 449, the rights acquired by the Pacific Railway Company by the grant of a franchise by the city of Los Angeles, were measured by the provisions of the Civil Code, although this case was decided after the charter of 1889 had been adopted.

The question there was as to the right of the Pacific Railway Company to go on the same track with another, and the mode of ascertaining the compensation to be paid as provided in section 499 of the Civil Code. [See the opinion, p. 452.]

We quote from this opinion the following:

> "None of the elements of an ordinary condemnation proceeding is involved in the litigation; there is no private property to be taken for public use, no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of the owner, which is held subject to the easement as long as the public continue to use the street as a highway. The maintenance of horse railroads

and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. * * * The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public."

Id 453.

There is much more to the same effect, and on page 454 they refer to this section 499 of the Civil Code as prescribing one of the conditions upon which the grant was made to it in the first place.

In People v. Los Angeles Electric Railway Co., 91 Cal. 338, the action was brought to have it determined that the defendant had forfeited its rights, privileges and right of way and franchises acquired by it under a municipal ordinance passed by the city of Los Angeles on the 28th day of January, 1886. The judgment of the court below was against the Electric Railway Company, and the appeal was taken to the supreme court. After the appeal was taken, the legislature had passed two acts, by one of which section 497 of the Civil Code was so amended as to invest municipal corporations with the power to grant a right to propel cars by electricity through streets and highways. By the other, ordinances passed prior to the passage of said act giving authority and permission to propel cars by electricity, were confirmed and ratified, and made valid.

The court held that this ratifying act was consti-

tutional, and that if there was any lack of power in the first instance, the state had, by that act, waived its right to enforce a forfeiture of the defendant's franchise on that ground.

It was further decided that the board of supervisors could not grant a franchise or right of way in any other way than according to the provisions of section 502 of the Civil Code.

The judgment was reversed, and it will be seen by the entire opinion that it was to the general laws upon this subject, namely, the provisions of the Civil Code and the act ratifying and confirming previous ordinances of the city, that the case was decided. The present charter of the city of Los Angeles was in full operation at the time of the decision, but it was never hinted that we were to look to the charter either for the power to construct a railway and operate it, or to affect the rights of the grantee in any way.

In People v. Sutter Street Ry. Co., 117 Cal. 604, on an information filed by the attorney general to have it declared that defendant usurped and unlawfully exercised the franchise of a street railway, and maintain in and upon Bush street, etc., switches, etc., the court said:

> "It is shown that defendant has abandoned no portion of its line. The supervisors had no power to extend the time within which the track must be completed. That is fixed by the statute, section 502 of the Civil Code, and a different period cannot be fixed in the grant of the franchise. The provision in the franchise that the time shall not commence to run, if valid, might have the effect

to extend the franchise for more than fifty years, contrary to section 497 of the Civil Code. No valid franchise can be granted by the supervisors which conflicts with the general statutes."

117 Cal. 611.

Again:

"I am unable to discover any act on the part of the city by which a forfeiture was waived, if it were conceded that a forfeiture could be waived by the city. No right is acquired by maintaining an obstruction in the street. Statutes of limitation do not run in favor of such a trespasser. If the law be, as is claimed by some, that such a franchise is not lost until it has been declared forfeited in a judicial proceeding, the city could but acquiesce. It has no power to institute an action to secure a forfeiture. That power is vested in the attorney general. As it could not enforce a forfeiture it could not waive it. The city cannot be estopped in respect to a matter over which it has no power. There is no statute which requires the municipal authorities to request the institution of such a suit, or which gives any force to such a request should it be made."

117 Cal. 612.

Now from the opinion in this case it is very clearly shown that the whole power of the city and county of San Francisco in such matter comes from general laws, not from its charter, and that the governmental control of the franchises is in the state, not in the city.

In Eisenhuth v. Ackerson, 105 Cal. 87, a case which, upon another point, is greatly relied upon by the defendants in this case, it was shown that the power of the city of San Francisco at least to grant

street railway franchises, came from the Civil Code, not from its charter, that is to say, that the franchise which was there under consideration and the grant which was there made, came from the Civil Code, and they held directly in that case that for the purpose and to the full extent of authorizing such governing bodies to grant street railway franchises, section 497 of the Civil Code is a general law, and by implication repeals all prior laws inconsistent therewith, and they held that it was not inconsistent with section 68 of the consolidation act which provided for the approval of the president of the board before it took effect. And they said that the Civil Code did not say anything about how such grants should be made, and therefore it was not inconsistent with that provision, and that the approval was necessary in that case.

To avoid referring to this case again we submit that the provisions of the Civil Code and those of this act of 1901 in relation to the grant of these franchises, are altogether different. The Civil Code did not offer them for sale, and did not direct that the governing body or anybody else should strike off, sell, and grant, to the highest bidder, but the powers which were there exercised were discretionary. The code didn't compel them to grant a franchise, but gave them the power to do so, and the municipality had the power, under the Civil Code to determine for itself whether it would legislate on the subject at all, and upon what conditions it would make such a grant, subject only to the limitations which the general law itself had imposed with regard to those conditions. The neces-

sity for the construction, therefore, did not exist under the Civil Code so far as the veto power of the president was concerned, any more than it existed when the city of Los Angeles acted upon these same powers which were conferred by the Civil Code. In each case there was a discretion to be exercised. Under the present act there is none at all.

But returning to the other question. In People v. Craycroft, 111 Cal. 544, it was held that the act of March 23, 1893, requiring the sale of railroad franchises in the streets of cities to the highest bidder, must be construed as applying only to cases of street railroads where *bona fide* competition is possible, and they gave the reason therefor, but manifestly held it to be a general law which superseded, so far as the subject to which it applied, the provisions of the Civil Code.

In Thompson v. Supervisors of Alameda Co., 111 Cal. 553, the act of March 23, 1893, providing for the sale of franchises, was directly held to control the entire proceeding, and when it said that said sale should be to the highest bidder, without stating other terms or conditions of sale, it meant cash, and that any bid for anything else than cash could not be received as a legal bid or any tender under the act.

Decisions of the supreme court of California leading to the same conclusions which we are about to deduce from these cases decided by the court, and the acts of the legislature referred to might be multiplied almost *ad infinitum*.

Now, what we claim results from them is this: That

in nearly all the charters of all the cities or towns that have ever been organized, or created, or incorporated, under the laws of the state of California, these very general powers to which we have referred over the streets of the city and the exercise of powers necessary to an efficient government, have almost invariably been given in their charters or in the general laws under which they were organized. Notwithstanding this fact, the legislature has continually been exercising the power, of itself making grants of street railway franchises in those towns and cities or by general laws conferring the powers upon other agencies, usually some municipal board, tribunal or officer, and these general laws have been before the courts in many cases, both before the constitution of 1879 was adopted providing for the freeholders' charters, and since that time, and before the charter of the city of Los Angeles, or the freeholders' charter of the city and county of San Francisco, and since the adoption of those charters, and there never has been a case in which the court has ever looked to anything else except the general laws as the authority to make such a grant, or ever denied or questioned the application of those general laws, and their control over all these municipal bodies.

In the Eisenhuth case, as we said before, they held that the provisions of the Civil Code authorizing the grant of these franchises did not conflict with the provisions of the charter of the city and county of San Francisco prescribing the mode in making the grant. It was manifestly implied that if the Civil

Code had conflicted with the charter, it would have controlled it.

But we say that all of these decisions of the courts and of the legislature have implied, and frequently directly determined, that there was no such conflict. But by the very terms of the constitution relied upon by our adversaries, the charter of the city of Los Angeles did not repeal or supersede the general laws not in conflict with it. And by the other provision, the charter is itself controlled by general laws except as to municipal affairs, and this granting of a franchise to construct and operate a street railway is not a municipal affair, and the provisions of the charter are not in conflict with those general laws, and hence we are to look to the general act of the legislature both for the authority to make the grant, and for the manner in which it is to be made.

If the construction which we here contend for is true, and if the general law is in conflict with the charter, because the charter says that an ordinance shall be necessary to the grant of a franchise, and that that ordinance must be approved by the mayor or passed over his veto, or become operative by his failure to return it within ten days, then the general law prevails. Furthermore, in construing statutes, they are to be construed as a whole, and each part permitted to shed its own light upon every other part.

And in looking into acts upon the subject under discussion, we are to arrive at a construction which will harmonize them all if such construction be reasonable.

We see plainly that the whole scope and purpose,

as well as the language, of the act of 1901, is absolutely incompatible with a mode of disposition which necessarily implies discretion, where none was given nor even permitted, and a discretion which may, as in this case it did, operate to prevent the doing of that which the legislature in peremptory terms commanded should be done. Hence it must fall to the ground, so far as the city of Los Angeles is concerned, if the charter mode of granting franchises is exclusive of every other mode in every case of disposition of franchise. Yet nevertheless, those general laws of 1893 and 1901 were operative to supersede the provisions of the Civil Code in so far as they were in conflict, and that has been expressly declared by the supreme court of this state. Therefore, if the act of 1901 can't operate in the city of Los Angeles, but does operate to repeal the provisions of the Civil Code, then there is no power to grant a street railway franchise in the city of Los Angeles at all, for we have already shown that the general municipal control referred to does not give the power to grant a street railway franchise, and the existence or non-existence of some other general law or express power given elsewhere to grant such a franchise does not affect the interpretation to be given to the charter of the city of Los Angeles. Charters which did not give such power expressly, but which did give these general powers, have been interpreted by other courts, and it is the settled doctrine that the power to grant a street railway franchise does not exist, and will not be implied from any such general provisions. But

now such results do not necessarily follow from the charter, and these general laws. When the charter of the city of Los Angeles said that in order to grant a franchise an ordinance was necessary to be approved by the mayor, the natural construction of it would be that the granting of franchises here mentioned and referred to, was the grant of such franchises as by the charter the city was authorized to grant. In other words, this is the mode of exercising its charter powers.

Now under the charter, the city has the power to grant many different franchises. It has the power to provide for supplying the city and its inhabitants with water and gas or either, or other means of heat and illumination.

Article I of the charter, Sec. 2, sub. 7, Stats. of 1889, p. 457.

It has the power, by ordinance, to regulate and provide for the lighting of streets, laying down gas pipes and erection of lamp posts, electric towers, and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof; and to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections; and to prohibit or regulate the erection of poles for telegraph, telephone, or electric wire in the public grounds, streets, or alleys, and the placing of wire thereon."

Art III, Sec. 31, Stats. of 1889, p. 464.

It has the power by ordinance to provide for maintaining a fire alarm and police telegraph system.

Id. Sec. 33.

Many other provisions of the charter are such as would necessarily include the power to grant franchises because necessary to the exercise of those powers which are granted.

When the power is given by the charter to grant franchises, and the same charter prescribes the mode in which the grant shall be made, the fair construction is that the mode has reference to the granting of those franchises which lie within the charter powers, and any other construction—an interpretation that this mode must be applied in the granting of all franchises, no matter from what source the power may proceed, nor what the direction which that source has given in reference to it—would have to be imposed upon the charter by every necessary implication through its context, or it would not be allowed at all. In this case there is no such necessity.

The counsel for the appellees in their argument in the court below seemed to be impressed with the notion that these charter powers given to the municipality over the streets of the city, created in the city itself a sort of title to the streets; that, by virtue of those provisions, it becomes the owner of the streets, and entitled to the possession of them, and that therefore the granting of rights of the character here treated of was the creation of interests in the property of the city itself, and must necessarily proceed from the city, or if not necessarily, at least this sort of pro-

prietary interest of the city would carry with it the power to create easements of this kind in them without any express grant of such power in the charter. But the city's power over the streets of Los Angeles are no greater under the freeholders' charter than they have been for the last thirty-five years and more. In the charter of 1865 and 6, and of 1878, the powers given to the city with respect to the laying out and opening, and altering, and extending, and improving, streets was quite as great as under the charter of 1889, and while the city has undoubtedly a large power over the streets, that does not create any such proprietary rights in the streets on the part of the city as is contended for by counsel, at least, such is not the view which the supreme court of California has taken of the powers of the state over the streets, nor the nature and character of the city's jurisdiction over them under any of the charters of any of the cities of the state, or any of the general laws providing for the incorporation of municipal corporations that have ever been passed by the state. It has been repeatedly decided that the state has the sovereign control of the streets of the city, just the same as any other public highways.

Thomason v. Ruggles, 69 Cal. 465, 472;

Polack v. Trustees of San Francisco Orphan Asylum, 48 Cal. 490;

San Francisco v. Spring Valley Water Works, 48 Cal. 493, 529;

Brook v. Horton, 68 Cal. 554, 558;

San Francisco v. Burr, 108 Cal. 460;

Town of Arcata v. Arcata & Mad River R. R. Co., 92 Cal. 639;
Blood v. McCarty, 112 Cal. 561;
Blood v. Woods, 95 Cal. 78, 86.

These cases deal with the subject in almost every way, declaring that the legislature possesses complete power to vacate a street in a city, and may commit that power to the municipal authorities, and after it has been committed, may withdraw it. That all public streets, alleys, and roads of the state are public highways for the people of the state, and the state has an original right to control it. That this doctrine applies equally to streets and alleys of a city or village as to country roads; that the municipality has no control over them unless the right of control has been vested by the state, and when it is so vested, the municipality acts as the agent of the state.

And it has been further held that the street, when dedicated, becomes the property of the whole state, which the legislature can dispose of it at pleasure.

San Francisco v. Burr, 108 Cal. 460.

Such is the doctrine, too, of other states, and so far as we know, of all of them. Among the cases which may be cited are:

People v. Kerr, 27 N. Y. 188;
Barhite v. Home Telegraph Co., 63 N. Y. Sup. 659;
O'Connor v. Pittsburg, 19 Pa. St. 187;
Mercantile Trust Co. v. Collins Park & B. R. Co., 99 Fed. 812;

People v. Suburban R. R. Co., 53 N. W. 349; Florida Cent. & P. R. Co. v. Ocala, etc., R. Co., 22 So. Rep. 692.

The case of Byrne v. Drain, 127 Cal. 663, is not at all in conflict with the doctrine that when the street is opened and becomes a public highway for the people of the state, it is under state control. The question which was in controversy there, was as to the validity of a local assessment for the improvement of the street, and it was held that that was a municipal affair, and that the charter powers of the city prevailed over the general so-called Vrooman act. But this again is in accordance with the principles maintained by Justice Cooley in the cases already referred to, namely, that the imposition of local assessments or local taxation upon the people and property of the city must be made by the municipal authorities. Besides, the constitution of California, as we have already said, does directly declare that the legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

Constitution, Art. XI, sec. 12.

And the case last referred to determines no more than that the legislature, though it may vest the municipality with the control, in whole or in part, of public streets, or give it jurisdiction over other sub-

jects, cannot impose taxes upon the local political community against its will.

Another constitutional objection made to this act by our opponents is founded upon section 13 of Article XI of the constitution, which declares that the legislature shall not delegate to any special commission, private corporation, company, association or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or to perform any municipal functions whatever.

But, as with many other arguments made by counsel, their construction of the act of 1901, and of the character of the franchises there treated of, must first be adopted before section 13 can have anything at all to do with the proposition. We have endeavored to show that the granting of a franchise to operate a street railway in a city is not a municipal improvement, certainly isn't city money, property or effects, and does not provide for the levying of taxes or assessments, nor the performing of any municipal functions whatever. On the contrary, franchises, as we have repeated doubtless too often, are sovereign prerogatives or privileges emanating from the sovereign, and the keeping of that fact in view will avoid many misunderstandings into which our opponents have fallen, and among them this supposed power of the mayor to veto the grant of a franchise under that act. When it is remembered that the things which

were dealt with in that act are rights and privileges residing in the sovereign, and granted by it, and by it alone, either directly or through such agents as it saw fit to adopt, it will be seen that in this instance the governing body was the agency selected by the legislature for the purpose of granting the franchises therein provided for, and that in acting upon this matter the council occupies no different position from that which would have been occupied by any other agent that the state saw fit to employ for the exercise of this function, or carrying its will into effect. If it had selected the city treasurer, the sheriff of the county, the chief of police, or any other public officer or tribunal, his position would have been exactly the same. He would have been the mere agent of the state clothed with powers prescribed by the act of the legislature, and none others, at least so far as this particular matter is concerned.

Instances of the exercise of the powers of the state through any agents which it sees fit to employ exist without number. It is said, however, with respect to this particular matter, that the granting of a franchise is a legislative act, and therefore that the council acted in a legislative capacity in making that grant. That legislative action is necessary to a grant of a franchise is admitted, but the legislative action in this case is found in the statutes of 1901. It by no means follows that the grant itself of a franchise need be a legislative act, or is, in its nature, a legislative act, any more than the granting of any other right, privilege or property whatever. When the legislature acts

directly in making the grant, it may be said, in some sense, to be a legislative act. But even then, the two things, the authority to make the grant, and the grant itself, are totally different acts. Legislative authority is absolutely essential to the disposition of the public lands of the state of California, as also of the public lands of the United States. But the act of issuing a patent, that is, of transferring the title, is not legislative. The legislature of California has passed laws for the disposition of the public lands of the state just as the Congress of the United States has, for the disposition of the public lands of the United States, and in this state the administration of those laws is committed to the land department, consisting of the surveyor-general, who is also *ex officio* the register of the land office of the state, and in the United States the power is vested in the Interior Department. And in the departments of both governments, a sort of quasi legislative power is vested to the extent of adopting rules and regulations prescribing the mode of proceeding in the administration of those laws.

Now, because the council happens to be a legislative body, as well as being clothed with some powers of a totally different nature, it does not follow that all its acts are legislative. And the powers which the council performed in this particular instance are exactly the same character as they would be if performed by some other agent selected by the state. And whenever Congress or the state legislature makes a grant directly to an individual or public corporation,

of the public lands of the state or of the United States, they have exercised both the legislative and the executive power in that act. They have determined, by it, the intention of the United States to dispose of it and determined the objects and purposes and considerations upon which, in its judgment, they should be disposed of. They have dispensed with the procedure ordinarily obtaining, but which originally came from themselves, and they have at the same time executed the grant which it has legislatively determined should be made. Keeping this in mind, it is not very much out of the way to say that the granting of a franchise is a legislative act. But that legislative act may consist of a single declaration of the will of the legislature, or it may be by the passage of laws authorizing the disposition prescribing the terms, appointing the agencies, and determining the powers of that agent in making such disposition. These purely legislative acts, coupled with the grant itself, make the grant of the franchise as much so as the power of attorney of the principal, and the exercise of the power by the agent, constitute the execution of the conveyance of property.

The legislature of the state of California passed an act creating a board of tide land commissioners for the disposition of the tide lands of the state. But it did not invest those commissioners with the power to legislate upon the subject as to whether they should be disposed of at all, or the terms or conditions upon which the disposition should be made, but it passed an act providing for the disposition of the tide lands,

and created this board as the agent of the state making the disposition thus provided for, and the grant itself and the exercise of those powers by that commission were not legislative acts.

Stat. 1867-68, p. 716.

We have been cited to the fact that the price paid for franchises goes into the city treasury, and is used for municipal purposes, and from this the conclusion is drawn that that of itself makes it a municipal purpose, or, to express the same thing more definitely, is a recognition of the fact that it is a municipal purpose; for, say counsel, if that were not so, and if the streets and the control over them were the property of the state, then the payment of the purchase price to the city would be in violation of section 31, Article IV, of the constitution of California, which declares that the legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision, of the state, now existing or that may hereafter be established, in aid of, or to, any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof in any manner whatever for the payment of the liabilities of any individual, association, municipal or other corporation whatever, nor shall it have power *to make any gift, or authorize the making of any gift of any public money* or thing of value, to any individual, municipal or other corporation whatever, and that the direction for the sales of these franchises and the purchase price to be paid to

the city, makes a case of a gift to the municipal corporation of the public moneys. There are two mistakes, however, in this proposition:

A franchise is not the property of the state in any proper sense of that term. It is a sovereign power, a prerogative. The granting of it confers property rights to the grantee, and the franchise is undoubtedly real property. Again, the streets are not the property of the state nor of the city, and therefore it is not a case of the state's donating property or money to anybody, the municipal corporation or anybody else. The privilege of exercising the franchise is bestowed by the state in its sovereign capacity, directly or through some agency appointed by itself, and the consideration is usually the public convenience and the public welfare. Prior to the year 1893 these franchises were never sold. The state granted them frequently directly, as already shown, and general laws were passed at an early period under which these franchises were granted under the authority of the state by the municipalities, but never for any other consideration than the public welfare and to promote the public interests. Now, when the franchises were thus disposed of, was the state giving away these franchises within the sense of the constitutional provision when it acted directly in making such grants? Has the city of Los Angeles been donating the city property to a private corporation when it has been making these grants under the provisions of the Civil Code, ever since the adoption of this constitution of 1879, and prior to 1893, of the street railroad franchises that have been granted since the adoption of the constitu-

tion of 1879 whether under the Civil Code or under these various acts providing for sale of the franchises? Such would be the case if the claim made here is correct. But nobody contends for any such thing. It is not claimed that the granting of these franchises without price was in violation of the constitution. But if the state could grant or authorize others to grant these franchises without any pecuniary consideration moving to itself or anybody else, what objection is there to an act which provides for the disposition of these franchises for a pecuniary consideration to be paid to the city? If they could grant it without any pecuniary consideration at all, we can see no objections to providing that such pecuniary considerations as shall afterwards be demanded should be paid to the city. The fact of such payment did not make it a municipal affair.

See:

State of Maryland v. Baltimore & Ohio R. R. Co., 3 How. 535; 11 L. Ed. 714, 720.

The Board of Education of the city of Los Angeles, as well as other cities, are usually called municipal officers, and the council levies taxes for school purposes, and the money is raised by them and apportioned to the city for its use for these purposes, but that does not change the fact that the educational department, including that department in municipal corporations, is a state institution.

See opinion of Myrick, Judge, in Earle v. San Francisco Board of Education, 55 Cal. 489, 495.

And see I Dillon Mun. Corporations, 3rd ed. sec. 58.

But again returning to the mode of exercising the power. It is obvious from the reading of this statute that no ordinance was required to make this grant at all, and any form that the council saw fit to adopt to express the final result was sufficient. And the mere fact that the form of an ordinance was adopted as the means of declaring that result, did not necessitate the approval by the mayor, nor change the character of the act in any respect. The mayor's approval is not necessary for many acts which the council do.

In Truman v. Board of Supervisors, 110 Cal. 128, it was held that the mayor's approval was not necessary to a tax levy, yet a tax levy is just as much a legislative act, and far more, than the grant of a franchise so far as concerns the mere act of vesting the right to the franchise in the person to whom it is granted.

There are many cases holding that the veto power is not only not implied, but must be expressly given, or fairly to be inferred.

Jacobs v. Board of Supervisors, 100 Cal. 121;
Volk v. New York, 47 N. J. L. 117;
State v. Ames, 31 Minn. 440;
City of Burlington v. Dennison, 42 N. J. L. 165;
Erwin v. City of Jersey City, 37 A. 732;
State v. Common Council, 55 N. W. 118.

Furthermore, if there is no discretion left in the council to finally strike off this franchise to the high-

est bidder, even if it were conceded that the statute contemplated the mere form of the mayor's signature, yet being a mere form the neglect to approve is a mere informality.

In State v. Ramsey County, 32 Minn. 181, it was held that when a particular officer has no discretion as to affixing his signature to a contract, the neglect to do so is an informality, merely, and will not vitiate the contract. And the same was held in Solena v. Newby, 48 Am. St. Rep. 653.

And besides all this, even if it were conceded that the provisions of the charter had any effect at all, and an ordinance were required, and which ordinance was to be approved by the mayor, yet nevertheless it is perfectly manifest that under the provisions of this statute the duty of carrying this contract into effect was imposed upon the city when the purchase price was paid by the appellant and the bond given as required by the statute. When this was done, the purchaser had done all that the statute required of him, and if anything were lacking to complete the legal title, yet still the equitable title was vested. This has been so held with respect to the sale of public lands in innumerable cases.

Wirth v. Branson, 98 U. S. 118; 25 L. Ed. 86;
Hutchings v. Low, 15 Wall. 77; 21 L. Ed. 82;
Frisbie v. Whitney, 9 Wall. 187; 19 L. Ed. 668.

And it is now well settled that the purchaser of real property is the equitable owner, and though the vendor still holds the legal title, he holds it only as

a trustee, and the vendee acquires an equitable ownership of the purchase property.

I Pomeroy's Equity Jurisprudence, sec. 105, sec. 368.

And this doctrine declared by Mr. Pomeroy in the sections referred to was applied by the circuit court of appeals for the fifth circuit, in Warner v. City of New Orleans, 87 Fed. 829, 834.

The rights which were thus vested in the appellant here, even though equitable merely, could no more be divested than legal rights. The contract thus made can no more be impaired, even if it could be conceded to be still executory, than could the contract made by the final act, the grant itself, be impaired.

In Safety Insulated Wire & Cable Co. v. Mayor etc. of Baltimore, 66 Fed. 140, 144, Judge Simonton, delivering the judgment of the circuit court of appeals of the fourth circuit, said:

> "There is another point of view. In its governmental or legislative capacity a municipal corporation is invested with discretionary powers. It has a discretion as to the time and manner of making corporate improvements, grading streets, making sewers, drains, vaults, etc. The courts cannot control this discretion. But when this discretion has been exercised, and the public improvements determined upon, and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial. [Dill. Mun. Corp. sec. 949; Weightman v. Washington, 1 Black, 49.] But, apart from and above all this, the obligation of a contract made between parties competent to contract

cannot be impaired at the option of one of the contracting parties. This doctrine controls whether the party to the contract be a sovereign state or an humble individual. It has been enforced against the action of states when the subject matter of the contract was the exercise of the highest governmental and legislative powers—the granting of a franchise. It has perpetuated an exemption from the power of taxation when such exemption has been the consideration for the contract between the sovereign and the citizen. And municipal corporations, mere creatures and agents of the sovereign, are not exempted from the operation of the rule. 'Upon authorized contracts within the scope of the charter powers of the corporation, and duly made by the proper officers and agents, they are liable in the same manner and to the same extent as private corporations.' "

66 Fed. 144.

In that case an ordinance was passed to place the wires of the police and fire alarm telegraph, and police patrol, systems under ground, and appropriated for the work $100,000 of the $250,000 set apart for laying conduits for underground wires. The board of fire commissioners and superintendent of police and fire alarm and telegraph, acting under this ordinance, advertised for bidders to do this work. The complainant put in a bid for $97,985, and it was accepted on the 28th of June, 1893. On the 30th the company declared its readiness to begin and conclude the work, but was informed on the same day that the vote awarding the contract was reconsidered because the ordinance was, as they were advised by the city so-

licitor, defective and void for indefiniteness. And the court held that the contract was made, and the city had no power to rescind it.

The present case certainly is no weaker, but, we think, very much stronger than the one just cited. Not only did the appellant in this case make the highest bid, but that bid was accepted, and the whole purchase price paid by appellant and accepted by the council or other governing body, and the money was paid to the treasurer under its direction. And the last act, the bond, was given and accepted and approved by the council, and filed in the archives of the city. And if any formal ordinance, approved by the mayor, was necessary to perfect the legal title to the franchise therein granted, here was a contract, and one which, under the terms of the law, left no discretion in the municipal authorities, whoever they may be, as to the making of the grant. And equity will consider that as done which ought to be done, and this for all collateral purposes, and that title, though it be equitable only, is entitled to the same protection from the federal constitution as any other title, no matter how absolute nor with what formality of legal instruments it be surrounded.

While our charter prescribes the title an ordinance must bear, the prescription is merely directory, and the action of the council will not be void for the omission of the title, or a defective title.

1 Dillon Sec. 310, Note 1.

St. Louis v. Foster, 52 Mo. 513.

Creighton v. Mansen, 27 Cal. 613, 628-629.

City of Napa v. Easterly, 76 Cal. 222, 227.

In the argument of this case in the court below, it was seemingly urged in all seriousness that the progress of civilization, the increase in property, and the rapid increase of material wealth in this city of Los Angeles, made it highly probable that the city might do better with this franchise at some other time or in some other way, that but for the conflict that was raised before the council, it might have produced more, even at the time it was sold, and this appeared to have furnished some reason in the minds of our adversaries why the court should not grant a decree which, as it was claimed, operated as a sort of a decree for specific performance, because of this possibility of its bringing a much greater price.

Contracts cannot be avoided because one of the parties may come to the conclusion that he could do better. When the constitution declares that the obligations of contracts cannot be impaired nor property divested without due process of law, it did not insert as a condition to the protection of that constitution, that the parties to that contract should be entirely satisfied with it. Such a limitation would eliminate the constitution, since it would seldom, if ever, happen that the provisions of the constitution would be invoked unless some party had become dissatisfied. A court will not set aside a contract by a municipal corporation for the purchase of property which has been delivered to it, upon the ground that it made a bad bargain, and paid more than the property was worth,

and that the action of the common council was dictated by improper motives.

City of New Orleans v. Warner, 175 U. S. 120, 121; 44 L. Ed. 98.

It was objected at the hearing below that there was more than one franchise sold for one bid in this case, and that, for some reason or other, this is not allowable under the statute.

The case mainly relied upon for that proposition was Beekman v. Third Ave. R. Co., 47 N. E. 277, 279-281. We have already referred to the fact that the objection was made in the demurrer of the city and others to the bill, that it was uncertain in that it didn't appear whether there were one or more franchises sold. To the objection thus raised, we have already made reply, but in the argument upon the whole case in the court below, it appeared that the real ground of objection was that at one or two places in this franchise the line indicated was over a private right of way and they claimed that this made a break in the franchise, because the city could not grant the right of way over private property. Hence that there were two franchises sold. While this objection was attempted to be sustained rather by the affidavits than by the demurrer, still it may be thought that the objection, such as it is, appears upon the face of the bill, and in answer we say:

1. That such a position cannot be read out of the act that is here under consideration unless by a very remote implication. Surely the objection, if it be good at all, must arise out of that act. Nothing is

more common than the granting of franchises to railroad corporations to construct railroads across the continent of the United States, and over every part of the state of California, and the general line of the road is frequently prescribed. But we have never heard it contended that every time it passes over private property it becomes a new franchise, or that the effect of its passing over private property is to defeat the grant. And we say again, that neither of these conclusions would attach unless, by virtue of some provision of the statute of 1901. But we do not know what that provision is, nor has our attention ever been called to it except the fact that the singular number is generally used in expressing the thing granted, but we do not think that the use of the singular number can have any such effect.

2. But it will be observed that the grant is not of a grant over private right of way, but on the contrary, this going over a private right of way is stated as an alternative twice, and it means evidently no more than that this governing body grants the right to run over certain streets which are specifically mentioned, but in making the way from one place to another, if you choose to go over a private right of way, you may do so.

Both of these references to private right of way will be found on page 7, and the first one is on the 17th and 18th lines of the page where, in describing the route:

> "Southerly on Compton avenue to Twenty-third street; thence southerly on Compton avenue to Thirty-eighth street; thence easterly on

> Thirty-eighth street to Compton avenue (or over private right of way from Compton avenue at Twenty-third street to Compton avenue at its intersection with Thirty-eighth street.)"

Again, further down the page:

> "Thence southerly on Tennessee street to Sixteenth street; thence easterly on Sixteenth street to Compton avenue (or over private right of way from Tennessee street at Little Rock avenue to the intersection of Compton avenue and Sixteenth street)."

Now the thing granted and sold was the right to go along these streets, but owing to the situation at these two points, if the purchaser of the franchise along the street saw fit to, or could, obtain upon terms satisfactory to himself, a private right of way which might be more convenient in making these changes, he was granted the right to do so.

As said before, this argument was made mainly upon the affidavits, but when the description contained in this notice is put upon the map of the city, it is seen that there is no break at all, unless the mere fact that getting from one point to another for a short distance, the going over a private right of way, would have that effect. The fact that the city had not the power to grant the private right of way has nothing to do with the case. As already stated, it does not have any such an effect on any other grant of a right of way for a railway. The government, state or federal, assumes to have no power to grant to a railroad corporation the right to run over somebody else's property except, indeed, upon the terms prescribed by

the constitution, that just compensation shall be made. The thing granted in either case, that is, under the act of 1901 or under these general acts granting franchises to railroad corporations, the thing granted is the right to construct and operate the railway along certain lines, and whatever private interest may be affected by it in such manner as to entitle the owner to compensation must be met by whomsoever purchases the franchise. It has become the settled law of the state of California that the construction of a street railway in the streets of a city is not the imposition of an additional burden which will entitled an abutting property owner to damages. But our constitution does declare that private property shall not be taken nor damaged for public use without just compensation being first paid.

Constitution, Art I, sec. 14.

While the construction of a street railway is not, according to the decisions of our court, the imposition of an additional burden merely in itself, and of itself, yet nevertheless it is conceivable that it might be so constructed with reference to some particular individual's property as to amount to a damage of that property. But the grant of the franchise would not be void on that account, but in the construction and operation of the railway it would be incumbent upon the purchaser of the franchise to make compensation. Nor would such fact in any manner affect the competitive bidding. The power of eminent domain necessary to be exercised in such case, unless the parties could

agree, is open to any and all purchasers or bidders alike, and the right of eminent domain in such cases does exist.

C. C. P. sec. 1238.

It was contended in the court below that the United States Circuit Court had no jurisdiction over the cause as such federal court. In other words, that the case was not one involving a federal question.

A sufficient answer to this is in the decision of the circuit court itself upon this question, the case decided by it and referred to in the opinion, namely, Riverside & Arlington Railway Company v. City of Riverside, 118 Fed. 736, and the cases cited therein.

In this cause there was the claim of a contract made with the city, and the impairment of the obligation thereof, and the claim that property had vested under those proceedings taken for the sale of the property, and that the subsequent proceedings operated to deprive the plaintiff of its property without due process of law, and the cases cited in the opinion last referred to, clearly show that it makes no difference whether the claim thus made is well or ill founded, it brings the case within the jurisdiction of the federal court provided, of course, that it is made in good faith.

And see in addition,

Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148, 155.

And that although the legislature of the state alone may have the right to make such a grant, that right may be exercised by direct legislation or through

other agencies duly authorized, having power for that purpose, and that the contract, when made, or the grant when made, is the act of the state. That when the municipal corporation acts under an assumed authority from the state, it is sufficient to sustain the federal jurisdiction.

Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258, 266; 36 L. Ed. 963.

Furthermore, when an ordinance is passed and accepted whereby a contract is made between the city and a private person, another ordinance which attempts to repeal that under which the contract arose, is void as being a law impairing the obligation of the contract.

Illinois Trust & Savings Co. v. City of Arkansas City, 76 Fed. 271.

See also:

Saginaw Gas Light Co. v. City of Saginaw, 28 Fed. 529.

Little Falls Electric & Water Co. v. City of Little Falls, 102 Fed. 663, 666-667.

Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23.

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 Fed. 113.

In the present case the passage of the subsequent ordinance or resolution for the readvertisement of these franchises, and the other acts set forth in the bill, were taken under an assumed authority from the state, and by virtue of the powers of the city over the streets, and its general powers to promote and main-

tain an efficient government, and the appellees still insist that the city was acting, not under an assumed authority merely, but that it actually had that authority. And if, as we claim, that under the action of the council in selling the franchise to the appellant there was a contract made, then the subsequent action of the municipal authorities did impair the obligations of that contract, and those acts were intended by the council to impair the obligations of that contract, if any were incurred. If we are correct in our position, under the grant made the appellant had the right to enter upon the streets of the city named in that franchise, and lay down these tracks and operate cars over them; they had the right, when in operation, to collect fares; they had the right to build all necessary turnouts and all necessary adjuncts. But the council did, by its final action, and in further evidence that it intended by its preceding acts to annul and rescind this contract, declare that the whole police power of the city should be used for the purpose of preventing the appellant from exercising any of those rights. And these acts on the part of the council were just as much legislative as the grant of the franchise in the first instance. And if the grant was the exercise of legislative power, as our adversaries have claimed that it was, then so was the action by which all of this was sought to be annulled and set aside.

In the case of Town of Arcata v. The Arcata and Mad River R. R. Co., 92 Cal. 639, it was held that after the defendant had acted upon the terms of the order, and had expended money upon the construction

of a road, the board could not rescind or recall the franchise which it had granted, unless the company had failed to comply with the terms or conditions of the grant.

92 Cal. 645.

In Mercantile Trust & Deposit Co. of Baltimore v. Collins Park Bank & B. R. Co., 99 Fed. 812, 813-814,

where the jurisdiction of the court was questioned, and where, though there was a difference of citizenship, it was claimed that when the parties were arranged in their proper order, there was not the diverse citizenship necessary to sustain the jurisdiction; and upon this question the court evidently doubted, but said it was unnecessary to discuss it further, for if a federal question existed in the case as claimed by the complainant, the jurisdiction did exist, and after stating the facts of the case, reached the conclusion that there was a federal question involved, and that the court had jurisdiction.

In that case the city, in 1891, had granted to certain persons as the representatives of several street railroad lines in the city the right to consolidate the same, and to electrically equip them, and in making the grant the city had reserved the right to allow any other street railroad company to condemn as much as five blocks of the several lines, whenever it should be necessary to allow other companies to reach the center of the city, and the grant in question was to the Collins Park Company to condemn five blocks of the Railway & Power Company, which had become

the successor of the Consolidated. The constitution of Georgia provided that the general assembly should not authorize the construction of any street passenger railway within the limits of any town or city without the consent of the city authorities, and in conformity with this provision of the constitution, and also of the acts of the legislature of the state to the same effect, the city had given its consent in 1891 to the Consolidated Company with the reservations as stated, and consent being asked in 1899 by the Collins Park Company for the use of the streets, the city's consent was given to the use of a number of them, as well as permission to condemn a portion of the track of the Railway & Power Company, and said the court:

> "Of course, the primary authority over all the highways of the state, as well as the streets of the cities and towns, is in the state, and this authority over the same would usually be exercised by the legislature. The constitution of Georgia wisely provides, however, that even the legislature shall not authorize a passenger street railway company to occupy any of the streets of a city or town until it has the consent of the authorities controlling the affairs of the city or town in which such right may be desired. Is it not true, then, that this act of consent—of withholding or granting the use of the streets of the city for such purposes, and, indeed, the entire subject-matter of control of the streets in this way—is the act of the state, through the city authorities as its instrumentality? Does not the provision of the constitution requiring such consent before the legislative grant becomes effective make the action of the city in this respect a part of the

> legislative act? The legislature grants the use of the streets, subject to the city's consent, and is not the city's consent, therefore, a part of the grant? Let us examine some of the authorities on the subject, with a veiw to the determination of this question."

Here the court proceeds to examine the cases upon these questions.

It may be true that acts of this kind, either by the state or by the city, are not strictly and merely legislative acts. But they are the exercise of legislative authority, and that power, when exercised, does become a part of the grant. And other acts of a similar nature, assuming to annul, repeal, or rescind, such contracts, or action taken which prevents the exercise of the rights contracted for, are also the acts of the state, and impair the obligation of the contract.

See also,

Western Paving & Supply Co., 128 Ind. 525; 26 N. E. 188; and 28 N. E. 88.

This case is also reported in 10 L. R. A. 770, 774.

Furthermore, if our contention is correct as to the effect of these proceedings, there can be no question of the fact that it was a contract. The language of the act of 1901 is that it shall be "struck off, sold and granted," and this was done in this case, as alleged in the bill, and the sale was made to the complainant. But a sale is a contract by which, for a pecuniary consideration caled a "price," one transfers to another, an interest in property.

Civil Code of California, sec. 1721.

Bouvier's Law Dictionary, word "sale."

The very use of this term makes it a contract, and upon the payment of the purchase price, the sale was complete, and under all the authorities it is protected by the constitutional provisions against any law impairing the obligation of the contract. See further:

Citizens St. Ry. Co. v. City of Memphis, 53 Fed. 715.

Detroit Citizens St. Ry. Co. v. City of Detroit, 64 F. 628.

But even if there be any doubt upon the question which we have just been discussing, namely, that there was a contract, and an impairment of the obligation thereof, there is no question that the court had jurisdiction of this cause under the XIV amendment of the constitution of the United States; for that provision of the constitution which prohibits a state from depriving any person of life, liberty or property without due process of law is not directed against legislative action merely, as is the contract provision of the constitution. In the latter, the constitution prohibits any state from passing any law impairing the obligation of contracts, but under the XIV amendment it is the state which shall not deprive any person of life, liberty or property, without due process of law. And it has been determined by this court that this provision of the constitution is directed against all the instrumentalities of the state, and that it is not at all necessary that the act by which the complainant is deprived of its property without due process of law, should be in itself an act of the legislature, or in the nature of a law passed by the legislature, or a municipal council

acting, or attempting to act, under the authority of the legislature.

Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U. S. 226; 41 L. Ed. 979, 983-984.

In re Commonwealth of West Virginia and J. D. Coles, 100 U. S. 339; 25 L. Ed. 676, 679.

Scott v. McNeal, 154 U. S. 34; 38 L. Ed. 896, 901-903.

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 F. 113, 119-123.

Ex parte Ulrich, 42 F. 587.

Nashville, C. & St. L. Ry. Co. v. Taylor, 86 F. 168, 183-184.

Cleveland Cy. Ry. Co. v. City of Cleveland, 94 F. 385, 394-395.

It is obvious, therefore, that the conclusion of the circuit court in favor of its jurisdiction was correct, and that jurisdiction once acquired extends to every question involved in the case, and will be exercised to give the full relief to which the parties may be entitled.

Omaha Horse Ry. Co. v. Cable Tram-Way Co. of Omaha, 32 F. 727.

Park v. New York, L. E. & W. R. Co., 70 F. 641.

Tennessee v. Davis, 100 U. S. 257; 25 L. Ed. 648.

R. R. Co. v. Mississippi, 102 U. S. 135; 26 L. Ed. 96.

Smith v. Bivens, 56 F. 352.

The case mainly relied upon by our adversaries to oust the jurisdiction of the circuit court is the case of

Kiernan v. Multnomah County, 95 F. 849. That was a suit by a resident and citizen of the state of Oregon against the sheriff of that county, to restrain the collection of certain taxes for which the sheriff had a warrant, and under which he threatened to sell complainant's property. The substance of the bill was that the tax and proceeding were not authorized by the law of the state in pursuance of which the sheriff was acting, and to permit the sale of complainant's property in the manner threatened would be to take his property without due or any process of law, in violation of the 14th amendment to the constitution of the United States. The court held that the case was not within the jurisdiction; that the 14th amendment had reference exclusively to state action, and not to the action of individuals. That if it referred to the acts by private individuals every invasion of one person's property rights by another, would be cognizable in the federal courts under this amendment; that the question sought to be presented related to the interpretation to be given the law of the state, and the complaint was that the law was misinterpreted, and would be misapplied to the injury of the plaintiff in his rights of property.

It is submitted that the case has no bearing upon the present question at all. Here the action is the action of the state,—at least, it was so alleged, in good faith, and upon probable grounds. It is true that the right asserted is derived from the statute of the state, and the proceedings thereunder. And it is also true that in determining the question of whether

we have any right, and if so what, necessarily involves an interpretation of the statute, and if that were sufficient grounds for defeating the jurisdiction, it would have defeated it in every case where the jurisdiction has been sustained. No one has any property rights except such as he acquires under the laws of the country in which he lives. No contract is ever made, except by such a transaction as amounts to a contract, under the law. All rights claimed, therefore, have their origin in laws of some character. In nearly all of the cases which we have cited, the rights claimed have been dependent upon some statutory provision, as in the present case. That the constitution of the United States protects contracts made with the state, either by direct legislative action, or through some public officer, or tribunal acting under the authority of the legislature, is settled beyond all controversy. The constitution of the United States protects the obligation of these contracts against impairment by state legislation, whether in the form of a constitutional provision of the state, or an act of the legislature, or by a municipal body created by it, and invested with the general powers and control over the subject, or selected by the state as a mere agency to execute the will of the state. And in every such case the federal court must interpret the laws of the state for itself. Otherwise, it could have no jurisdiction, and no power to secure to the citizens of the United States the protection which the constitution of that government guarantees to them.

These principles have been necessarily determined

in all the cases which we have cited. Some may be a little more specific than others, but the same questions are always involved.

In Central Trust Co. of New York v. Citizens' Trust Co. of Indianapolis, 82 F. 1, it was urged that the suit could not be maintained against the prosecuting attorney, Wiltsie, because he represented the state of Indiana. The court said:

> "If the enactment here in question be valid, then Mr. Wiltsie does represent the state; not the state as a proprietor, however, but the state as a governmental agency. If the enactment be invalid, then he does not represent anything. On the latter hypothesis, he, or any successor to him in office, in attempting to enforce the penalties in the enactment of 1897, would be merely a wrong-doer. The theory of the bill is that that statute is unconstitutional and void. If complainant be mistaken on this one proposition, then the bill cannot be sustained as to any defendant. * * * If, as said, the enactment of 1897 be invalid, then Mr. Wiltsie does not here represent the state; if it be valid, he does. But, on the latter hypothesis, the entire suit must be disposed of before any question special to Mr. Wiltsie can arise. The validity of the amendment, I take it, this court must pass upon."

And after disposing of preliminary matters as to the character in which Mr. Wiltsie was to be regarded, the court further said:

> "When a federal question is involved, the decision of the highest court of the state is not final, but is reviewable by the supreme court of the

United States. To this extent, at least, the judicial power of a state is subordinate to that of the United States. But there is no relation of subordination on the part of any federal court to any state court. In certain cases the federal courts, of their own motion, follow the decision of the state court, as determinative of the rights of a litigant. * * * But where the controversy concerns a contract, and the meaning of the contract depends *on the construction of a state statute or a provision of a state constitution,* a decision on the meaning of said statute or constitutional provision by the highest court of a state, made after the contract was entered into, and rights had vested thereunder, is not conclusive upon a litigant in a federal court. The litigant in such a case is entitled to the independent judgment of the national tribunal."

82 F. pp. 4-5.

And much more to the same effect.

In Bancroft v. Hambly, 94 F. 795, Judge Ross, in delivering the opinion of the Circuit Court of Appeals of the Ninth Circuit, after referring to the decision of the Supreme Court of California interpreting the same contract there under consideration, and after saying that as a precedent it was entitled, as were all of the opinions of that court, to great respect, said:

"The present case, however, involves the interpretation of a contract not in any way dependent upon the construction of any state law, and, that being so, we are not at liberty to follow the decision of that court construing the contract if such contract does not meet with our approval,

but are bound to exercise our own independent judgment."

94 F. 979.

Now, while the interpretation of the act of 1901 by the Supreme Court of California might be binding upon this court in some of its features, yet in the absence of any such decision, the circuit court was, of course, compelled to determne whether there was a contract for itself, and it is true that determination involved necessarily the interpretation of the statute under which it was claimed to have arisen.

In Bank of Kentucky v. Stone, 88 F. 383, a case which is important on many questions involved in the present controversy, the court, after concluding that a judgment of the state court pleaded in that case, and wherein it had been adjudged that the transaction there referred to was a contract binding upon the parties, and that judgment being, as it was, practically between the same parties, was *res judicata,* and that there was no escape from the conclusion that the defendants were estopped from asserting that the complainant had not a contract exempting it from any other taxation than that provided by the Hewitt law, and therefore that the act of November 11, 1892, was an infringement of that contract, and impaired its obligations in violation of that provision of the constitution of the United States, said:

"It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does not arise under the laws or the constitution of the United States. We cannot assent to this suggestion. The

> complainant asserts that it has a contract with the commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort, and the county of Franklin, by the enforcement of a subsequent law of the state, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties; but it does not free the court from the obligation to enforce the constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established."
>
> Id. 396-397.

In Douglas v. Commonwealth of Kentucky, 168 U. S. 488; 42 L. Ed. 553, 556-559, this court held that it was not required to accept the principles announced by the state court as to the extent to which the contract clause of the federal constitution restricts the power of the state legislature, and said:

> "The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the federal constitution. This contention is disputed by the state. So that the issue presented makes it necessary to inquire

whether that which the defendant asserts to be a contract was a contract of the class to which the constitution of the United States refers. This court must determine—indeed it cannot consistently with its duty, refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the constitution of the United States is a contract, the obligation of which is protected by that instrument against hostile legislation."

And the court quoted from the opinion of Mr. Justice Wayne in Jefferson Bank v. Kelly, the following passage:

"The constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, *with a single exception,* and that is when it has been called upon to interpret the contracts of states, though they have been made in the forms of law, or by the instrumentality of a state's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appeal to it be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide,

independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion of the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the constitution of the United States follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a state upon such a contract, whether it be one claimed to be such, under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority.

"The doctrine that this court possesses paramount authority, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous cases."

42 L. Ed. 557.

It is thus settled by the decisions of the federal courts that it determines for itself whether a contract exists, and whether the act complained of impairs the obligation, and whether property rights have been vested under the proceedings alleged, and whether the

action of the municipal authorities deprived the parties of their property without due process of law. And if the supreme court of California had ever given an opinion upon any similar case, and holding that no such contract existed under these proceedings, and no property rights had vested thereunder, such a decision, whatever might be the respect to which it was entitled and which would be accorded to it, would not be binding upon the federal court. And, as we have already shown, the fact that in determining these questions it is necessary to interpret a state statute, not only makes no difference in the duty of this court, but a case can hardly arise in which it is not called upon to interpret the laws of the state, and apply them to the case before it. And as to the subsequent conduct of the council, it is obvious that there is no comparison between their action, and that of an individual, or a sheriff threatening to sell property for the payment of taxes. The council of the city of Los Angeles, assumed that under its charter the final grant of the franchises struck off and sold to the appellant must be by an ordinance, and that under its charter that ordinance must be approved by the mayor, or retained by him beyond the ten days, or returned with his objections within the ten days; and that in the latter case it was necessary to pass the ordinance by a vote of three-fourths of the council over the veto in order to its finally taking effect, and that, acting under this assumed authority and indeed, regulation of its own conduct by the charter, it did pass the ordinance, sent it to the mayor, who vetoed it; the

council refused to pass it over his veto, and thereupon assumed and asserted that the appellant had no rights whatever under the action which it had previously taken, and proceeded, under an assumed authority from the statute of 1901, to order it referred to the committee for the purpose of reselling it. And acting upon the assumed authority given it by its charter over the streets of the city of Los Angeles, it proceeded to take most efficient measures to prevent the appellant from performing the obligations of the contract on its part, or exercising any rights or privileges or franchises under the contract and conveyance thus made. And there is no question about the jurisdiction of the court over this controversy.

And see further upon these questions:

Sawyer v. Parish of Concordia, 12 F. 754;

Dorian v. City of Shreveport, 20 F. 401;

Michigan Telegraph Company v. City of Charlotte, 93 F. 11;

Houston & Texas Central R. R. Co. v. State of Texas, 177 U. S. 66; 44 L. Ed. 673, 680.

It was also claimed in the court below that the circuit court had no jurisdiction as a court of equity. But whether a bill is sufficient to entitle the complainant to relief, and whether it is sufficient to bring the case within the jurisdiction of a court of equity, are very different questions. Indeed, the determination that the bill does not state facts sufficient to constitute a ground of relief is itself the exercise of jurisdiction. But the bill in this case is one which looks to equitable relief, and no other. And there is no

doubt of the forum which has the jurisdiction to determine whether its allegations are or are not sufficient. That is no more a jurisdictional question than the determination by a court of law whether or not a complaint states facts sufficient to constitute a cause of action. Nor is there a failure of jurisdiction here upon the ground that there is an adequate remedy at law. It has been frequently decided that the remedy at law, in order to exclude the jurisdiction of a court of equity, must be as complete, as practical, and as efficient to the ends of justice in its prompt administration as the remedy in equity. It was so decided in the City of Walla Walla v. The Walla Walla Water Company, 172 U. S. 1; 43 L. Ed. 341, 346.

Many authorities are there cited in support of the same proposition, and it is not necessary in this case to pause to examine the difficulties which would make it impossible that any remedy at law would be adequate, if indeed there be any remedy at law at all. Those elements of damage which would enter into this case are to be found and discussed in the Walla Walla case before referred to, and fully considered in many other cases which will be cited upon another proposition.

What damage would accrue to this plaintiff by delay in construction and operation of its roads, the uncertain element of possibly competing lines being constructed while being delayed, the profits which might accrue to the plaintiff from the operation of its roads, and how far the value of its franchises so purchased might be impaired, and other considera-

tions of like character, belong to that category where it is impossible to determine the extent of the injury which it would suffer. And that those injuries are of an irreparable nature is fully considered in other cases of a like character which we shall cite upon the last remaining question presented to the court below.

It was seriously argued in the circuit court that the complainant was not entitled to the remedy by injunction. That the injuries which complainant will suffer are irreparable in their nature, and that injunction is the proper remedy to prevent the wrongs which are threatened, has been many times determined. It has been determined in not a few of the cases which we have already cited. One of the principal arguments urged in the court below upon this subject was that the suit does, in its substance, look to the taking possession of the streets of the city of Los Angeles, and, as claimed there, ousting the city from that possession, and it was said that injunctions are not granted to oust one party from possession, and to put another in possession. But the difficulty with this argument is that the foundation upon which it rests is not true. The city of Los Angeles neither owns the streets nor is in the possession of them, nor is entitled to the possession, and furthermore, the complainant did not, by the purchase of the franchises referred to, acquire the title to the streets nor the right to the possession of them. It acquired no rights to those streets other than that which belongs to the public generally, namely, the right to occupy and use them in such

manner as to render available the property rights which it did purchase. And this is the right which pertains to the public generally in the streets of a city. A drayman may occupy a greater space in the streets, and use them for purposes different from those which pertain to a footman or the rider of a bicycle, but this is only because to carry on his business it becomes necessary to make a different use from any that is required by one who is traveling on foot, but the drayman cannot exclude other people from the streets, nor occupy them beyond the necessity for the proper conduct of his business. And so it is with the railroad company, and with every other person and corporation. And all the right in the streets which the complainant acquired by the purchase was the right to such reasonable and necessary use of the streets as would enable it to construct and operate its roads, working no unnecessary inconvenience to the rest of the public to use the streets for their several vocations, or for their pleasure. The franchises granted do not, therefore, turn over the possession of the streets to the plaintiff, still less the ownership, nor give any greater right than that which we have just mentioned. And the injunction which simply enables it to exercise the rights and powers and privileges and franchises which it purchased, and paid for, would certainly have no greater effect than the exercise of those rights without the injunction.

Neither do the franchises which are here granted operate to surrender the control of the streets by the city. The city has never been deprived of the powers

over the streets given by the charter, by the innumerable street railways that have already been constructed, and are now being operated. But the control of the streets does not mean that the city has the absolute right of pssession any more than this right of the use by the various corporations and individuals for all the purposes to which public highways are applied, means that they have the right to the exclusive possession. And as the appellant here claimed only the rights for which we have been contending, its right to an injunction to protect those rights, is beyond question. The principles which have been laid down and applied in innumerable cases, some exactly like the present, others of a kindred nature, have settled this matter beyond all controversy. See the Walla Walla case already referred to.

Smith v. American Nat. Bank, 89 F. 832;

Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 F. 261, 264-266;

Los Angeles City Water Co. v. City of Los Angeles, 88 F. 720;

177 U. S. 558; 44 L. Ed. 886;

Bondholders v. R. R. Commissioners, Fed. Cas. No. 1625;

Piek v. Chicago & N. W. R. R. Co., Fed. Cas. No. 11,138;

Minneapolis Brewing Co. v. McGillivray *et al.*, 104 F. 258, 270-272;

Foster v. City of Joliet, 27 F. 899;

City of Joliet v. Foster, 121 U. S. 286; 30 L. Ed. 942;

Iron Mountain R. R. Co. of Memphis v. City of Memphis, 96 F. 113;

Barthet v. City of New Orleans, 24 F. 563, 567-568;

Kirwan v. Murphy, 83 F. 275;

Caldwell v. Robinson, 59 F. 653. Also 67 F. 391;

Singer Sewing Machine Co. v. American Union Buttonhole & Embroidery Co., Fed Cas. No. 12,904;

Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 F. 347, 358-359;

Cleveland City Ry. Co. v. City of Cleveland, 94 F. 385, 409;

St. Tammany Water Works Co. and City of New Orleans v. New Orleans Water Works Co., 120 U. S. 64; 30 L. Ed. 653;

New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650; 29 L. Ed. 516;

Leverich v. Mayor *et al.*, of Mobile, 110 F. 170;

City Ry. Co. v. Citizens Street R. R. Co., 166 U. S. 557; 41 L. Ed. 1114.

The appeal in this last case was taken from the judgment reported in 64 Federal, 647. And see,

Citizens Street Ry Co. v. City of Memphis, 53 F. 715.

Another argument insisted upon in the court below upon this proposition was that courts will not enjoin municipal authorities or other legislative bodies from exercising their legislative or discretionary powers. It might be a sufficient answer to this that the legisla-

tive powers had been exercised and were seeking to enjoin the enforcement of that legislation against the complainant in this case. All action of the council is not legislative, notwithstanding that it is a legislative body. But then, whatever may be the character of its action, that the injunction will lie is determined by the cases already cited. In the case of the Los Angeles City Water Company against the City of Los Angeles, in the 88th Federal Reporter, and the case of the same title in the 103rd Federal, and the decision of this court on appeal from the judgment in the case reported in the 88th Federal, all of which have been hereinbefore cited, would of themselves be a sufficient authority against this proposition. In those cases the council of Los Angeles passed an ordinance regulating the rates to be charged by the Los Angeles City Water Company for the use of water, and in both cases it was claimed that the ordinances attacked were in violation of the contract between the Los Angeles City Water Company and the City of Los Angeles, and the object of both suits was to enjoin the city from attempting to enforce those ordinances, and the injunction was granted in both cases, and affirmed by this court in one of them.

But, as already said, all action of legislative bodies is not necessarily legislative, nor is it true that every act in the nature of legislative action is beyond the control of the courts.

In Alpers v. The City and County of San Francisco, 32 F. 503, Mr. Justice Field, after saying that

the legislative acts of the municipality cannot be enjoined, added:

> "But the unconstitutonal acts of either party may be annulled. * * After its passage the judiciary may declare the law unconstitutional. * * * But previous to that time judicial powers cannot be invoked."
>
> 32 F. 508.

Again:

> "In what we have said of the want of authority in courts of equity over the action of a municipal corporation, we confine ourselves strictly to such action as is *purely legislative*, upon a matter which is, by its charter or law, made subject to its *legislative discretion*. That the exercise of such legislative discretion of municipal bodies shall be exempt from judical restraint, is declared in the laws of this state."
>
> *Id.* 507.

On the same page, and before that, he had said:

> "A municipal corporation may be clothed, and generally is clothed, with other than legislative powers, and in their exercise may, in many instances, be brought under the jurisdiction and control of the courts. If, for instance, it be the holder of property as trustee, it may be required to execute the trust assumed, and to make such disposition of the property as the trust requires. If, being the owner of property, it contracts for its sale, the execution of the contract can be enforced as in the case of such contracts by natural persons. So, also, if it attempt to act upon matters not by its charter or law subject to its jurisdiction, it may be reminded of the limitations upon its powers, and brought to a more careful

consideration of them, by the process of the courts; and if the rights of third parties will be injuriously affected by its proposed action, it may be enjoined therefrom. It matters not in such cases that *its action takes the form of legislation* when it is not, in fact, the exercise of legislative power, or upon a matter which is committed to its jurisdiction."

32 F. 507.

See,

North Jersey Street Ry. Co. v. Inhabitants of the Township of Orange, 43 A. 53.

It is true it has been said by the supreme court of California that the granting of a franchise is a purely legislative act, the exercise of legislative power. And this, no doubt, is true in the sense in which it was manifestly intended, namely, that the granting of a franchise must be either the act of the legislature directly, or it must come from legislative authority. But even where this has been said by the supreme court of Californa, it has occurred in cases where it was not necessary to be technically accurate. The most of them are cases where writs of *certiorari* were applied for. It has been many times held by the supreme court of California that the writ only lies to review judicial action, and about all that was decided in most of those cases was that the action was not judicial.

In the Spring Valley Water Works against the City and County of San Francisco case, 82 Cal. 286, 307, the court having this very matter distinctly before its attention, said:

"The ground taken by the appellant is, that the fixing of rates is a legislative act; that by the terms of the constitution the board of supervisors are made a part of the legislative department of the state government, and exclusive power given to them which cannot be encroached upon by the courts. In other words, the board of supervisors, for the purpose of fixing these water rates, is a part of one of the co-ordinate and independent departments of the state government, and, as such, beyond and independent of, any control by the judicial department.

"This court has held that the fixing of water rates is a *legislative act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling judicial action.* * * * There are other cases holding the act to be legislative, but whether it is judicial, legislative, or administrative, is immaterial. Let it be which it may, it is not above the control of the courts in proper cases."

82 Cal. 307-308.

See also the case of Davis v. Mayor etc., of New York, 4 Duer, 451-497, and the quotation made from it in 82 Cal. 308-311.

This opinion delivered in the Spring Valley Water Works case will, we think, explain every case in the California reports that seems to be holding the extreme doctrine contended for by our adversaries.

In People v. Dean, 122 Cal. 421, is a distinct enunciation of the proposition that the granting of a franchise under the act of 1893, quite similar to the act of 1901, was a purely legislative act, but in that case

there was an application for a writ of *certiorari* which was denied, and the entire meaning of it was that it was not judicial, and therefore not subject to a writ of *certiorari*. The legislation in this case is in the act of 1901, which nobody is trying to enjoin. The acts of the council in pursuance of that act and of the authority therein conferred, is simply the performance of those duties and the exercise of the powers given for the purpose of carrying the act into effect, and doubtless are a part of the contract made. Its acts in directing the mayor and the chief of police to employ the police power to prevent the complainant from exercising the rights granted may be legislative in character, but those resolutions and the orders were passed before this suit was begun, and we deny that the forcible prevention of the complainant from exercising its contract and property rights are legislative. They are simply the means by which the city threatens and intends to enforce its orders which, if illegal, may be restrained.

We feel conscious of having devoted much more attention to the jurisdiction of the court, both as a federal court and a court of equity and to the question of the propriety of the remedy sought here, probably, than was necessary. We think that the one question in this case that is of any difficulty, or admitting of more than one opinion, is the question to which the Honorable Circuit Court gave its principal attention. And if, under a fair construction of the act of 1901, a contract was made, and property rights were vested in the complainant, there is no question as to the juris-

diction of the court, or the right of the complainant to the relief sought.

Respectfully submitted,

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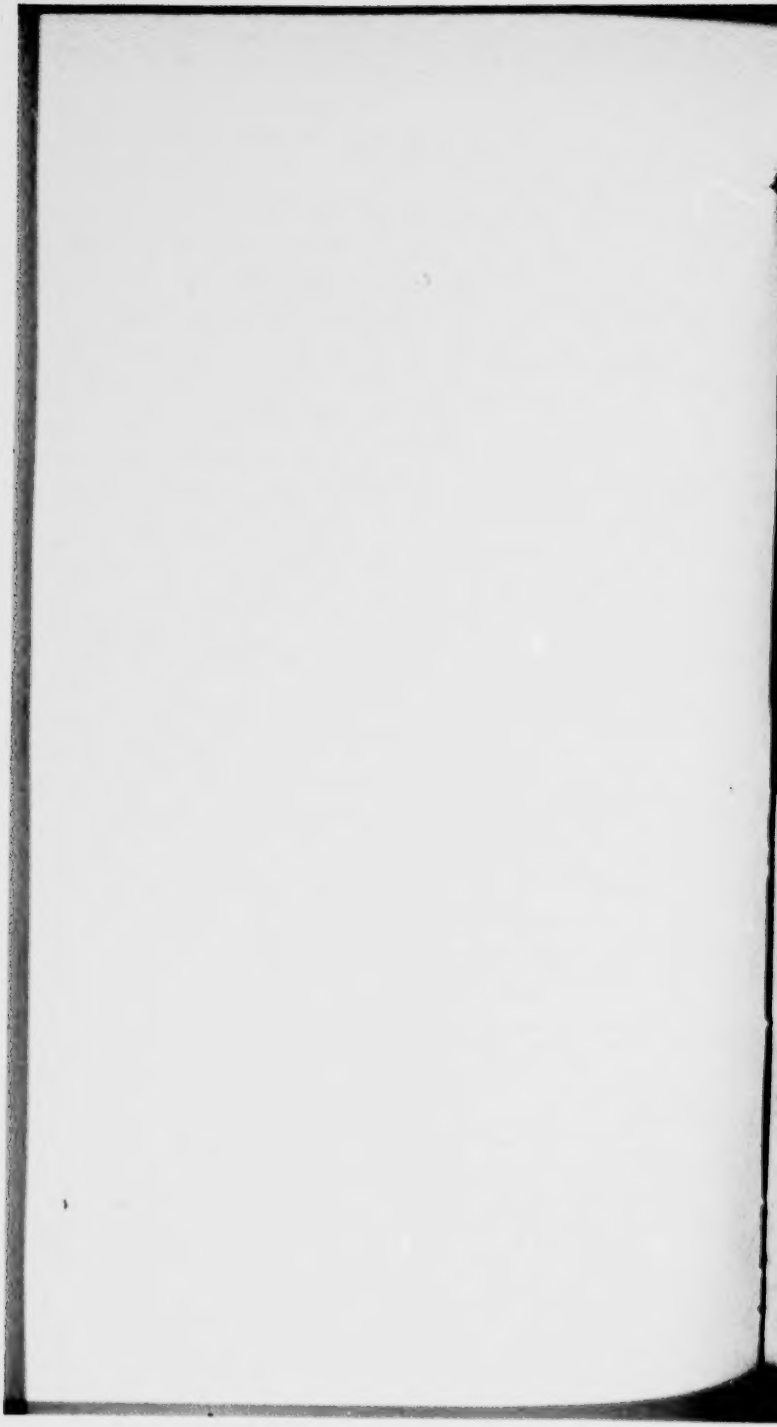

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 175.

Pacific Electric Railway Company,
Appellant,
vs.
The City of Los Angeles, P. W. Powers et al.,
Appellees.

REPLY BRIEF OF APPELLANT.

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In replying to the brief of the appellees, we pass over the first 31 pages of the brief, which is devoted to the proposition that the circuit court had no jurisdiction of the cause, without further remark than to say to this we have already replied in our opening brief. [See Brief, pp. 141-158.]

As to the other points, we take them up in the order in which they are presented in the brief of the appellees.

I.

On page 32 the general proposition is laid down that the appellant did not acquire any valid franchise for the reason that the proceedings for the sale were plainly defective and incomplete, and the first objection made is that the notice of sale did not conform to the requirements of the act of 1901 in the kind of franchise offered for sale.

Under this caption, if we understand the objection, it is that the statute provides, and the appellant applied for, an electric street railway franchise to be constructed and operated upon certain public streets of the city, but the notice described a franchise for a railway along the streets in Los Angeles, to carry passengers and freight. And that it declared that the street railway constructed and operated under the franchise should be used only for the transportation of passengers and United States mail, and for transportation subject to the conditions and restrictions hereinafter mentioned, of baggage and such packages and commodities as could conveniently be handled and carried in closed cars of the character hereinafter described. And other passages of the notice are

set forth for the purpose of showing that this was an electric railway franchise for carrying passengers and freight. And it is said that this is essentially different from the kind of franchise described in, and authorized to be sold by the act of 1901; and this is wrought out upon the supposition that the term "railroad" and "street railways" are two different things always and at all times, and many different cases are cited which are supposed to sustain this contention. Under this interpretation of the meaning of the terms "railroads" and "railways" on the one hand, and "street railways" on the other, it is contended that the carrying of freight upon these cars makes this something other than a street railway franchise, and therefore is a something which was not authorized to be sold by the statute of 1901, the provisions of which are set forth in full in the bill and in the brief. The two provisions of that statute bearing upon this particular question are the following:

> "Sec. 1. Every franchise or privilege to erect or lay telephone wires, to construct or operate *street railroads* upon any public street or highway * * * to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise *any other privilege* whatever, hereafter proposed to be granted by the board of supervisors, boards of trustees, the common councils," etc.

There is an exception from this of *"steam railroads"* and telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves.

Here is the enumeration of the franchises to be granted so far as regards the present controversy, and also of its exceptions. If street railroads were in this statute a term of such import as to exclude the ordinary commercial railroads, why should there have been an exception of "steam railroads"?

Furthermore, why should the legislature, out of abundance of caution, after specifying certain franchises or privileges, then have included all others hereafter proposed to be granted, and then followed this with the exceptions enumerated if it were not intended that every species of franchise or privilege hereafter proposed to be granted should be granted in the manner provided in that act, with certain exceptions, and thus the legislature covered the whole ground, the things the granting of which should be made under the provisions of that statute, and such exceptions from that provision as the legislature saw fit to make. From the very terms of the act itself, therefore, it will be seen that the term "street railways" was not being used in any restricted sense, but was including every kind of railroads except those which it denominated in the excepting clause "steam railroads."

It is not denied, of course, that the term "street railways" in many statutes, and as used elsewhere, may be used in the restricted sense contended for by counsel for the appellees. And that also the term "railroad" is often used in a sense which manifestly is not intended to include street railways. But neither term has imposed upon it any such rigid definition as necessarily excludes the other.

The statutes of this state have shown, in many instances, that the laws prescribed for the regulation of railroads have been intended to apply to both, at least in the main. The Civil Code of this state treats, under one title, namely Title III, "Railroad Corporations", commencing with section 454, and extending to and including section 494.

Street railroad corporations are dealt with under Title IV, commencing with section 497. And at section 510 it is declared that "street railroads are governed by the provisions of Title III of this part so far as they are applicable, unless such railroads are therein specially excepted."

Cook on Corporations, 4th edition, volume 3, section 915, says:

> "Where there is no statute in the state relative to the powers of street railroads, the courts hold that they have generally the same powers that are given by statutes to steam railroads."

And that

> "Where the statutes authorize railroads to consolidate or mortgage their property, a street railway comes within the meaning of the statute."

He says, moreover, that the extent of the street railway companies' right to lay down single or double tracks, freight tracks, switches, etc., depends upon the words of the grant.

And the supreme court of California, in Ferguson v. Sherman, 116 Cal. 169, had before it this question:

The defendant was sued as a stockholder of a Kansas street railway corporation, and the Kansas constitution, section 11, article XII, provided that debts from corporations should be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as should be provided by law, but such individual liability should not apply to *railroad corporations* nor corporations for religious or charitable purposes. The defendant contended, among other things, that he was not liable under the Kansas law, because the street railway corporation was a "railroad corporation" within the meaning of that constitutional provision, and the supreme court, having under consideration this particular question, namely, whether the Electric Rapid Transit Company was a railroad corporation under the

laws of Kansas, and after saying that they approached the consideration of the question with some reluctance because that particular provision of the Kansas constitution had not been interpreted by the courts of Kansas, said:

> "Agriculture was and is one of the most important industries of Kansas. Cheap transportation and a ready market are essential to agricultural success. This the framers of the Kansas constitution well knew, and it is not unreasonable to infer that the exemption held out to stockholders of railroad corporations organized under the laws of Kansas was designed to promote and stimulate the building of railroads within the state in aid of one of its greatest industries. It is not so easy to believe that the purpose of that constitution was to exempt from liability the stockholders of street railways, which are designed merely to facilitate travel and communication upon the public highways of a municipality, while at the same time the stockholders of mercantile, manufacturing and banking corporations, which corporations certainly tend as much to the public convenience and welfare as do street railroad corporations, should be held to a strict accountability. We recognize that the word 'railroad' or 'railway' as used in a law is broad enough to include street railroads, and that many cases have arisen where courts have held that the word does in its signification include such corporations, but when all has been said, each case has been determined upon its own facts, having in view the circumstances of the case, the context, the presumed intention of the lawmakers, and the policy of the particular

state in regard to the matter, and therefore while a large number of cases may be cited in which the courts have held that the statute under consideration dealing with railroads embrace in their provisions street railroads, an equal number could be instanced in which the courts have, under the facts of the case, narrowed and limited the application of the statute, and held that street railroads were not included. It would be difficult, if not impossible, to formulate any rule to govern the determinations. In this state the difficulty is much relieved by the distinction which our codes make between railroad corporations proper, and street railroad corporations. This consideration, however, is entitled to weight. The exemption from liability of stockholders of railroad corporations under the constitution of Kansas is an immunity in the nature of a grant or privilege. There is no rule of construction which makes it mandatory upon a court to hold that 'railroad' must include 'street railroads', and upon the principle that all grants from the state are construed most strongly in favor of the grantor, it would certainly be proper in this case, no reason to the contrary being shown, to narrow rather than to broaden the meaning of the word, and to limit its applicability to the one class which is necessarily embraced within the term; and we therefore conclude that the provision of the constitution of Kansas here under consideration was not designed to apply to stockholders of street railroad corporations."

116 Cal. pp. 177-178.

They conclude this opinion with a quotation from Foote and Everett's Law of Incorporated Companies, which is as follows:

> "Whether any of the statutes relating to railways apply to street railways is an undetermined question. It is a question which arises again and again, as can readily be imagined, since the statutes have very little to say about street railways. Still, for various reasons, it is believed that the great body of railroad legislation of the state does not apply to street railways."

The key note, however, was struck when it was said that the interpretation of these terms cannot be provided for by any general rules, but the law is to be interpreted in the light of all of its provisions, and from the circumstances attending each particular case.

This is further illustrated in the case of the People *ex rel* San Francisco & San Joaquin Ry. Co. v. Craycroft and others, Board of Trustees of the City of Fresno, 111 Cal. 544.

This company was organized under the laws of California and was authorized and empowered to construct, maintain and operate a steam railway for the transportation of passengers and freight from a point at or near the Bay of San Francisco, in a line generally easterly and southeasterly to a point in Bakersfield, in Kern county, a distance of about 300 miles.

The route as laid out passed through the city

of Fresno, and the petitioner had constructed twenty miles in length on such proposed route between Stockton and Fresno. It was necessary for the proper and successful operation of the road, that it should be constructed as laid out, and this involved the right to pass through the city of Fresno upon a line and over and across streets particularly designated in an application which was presented by the petitioner to the respondents. Instead of passing upon the question, the board of trustees resolved to advertise for bids for the sale of this supposed franchise, under the act of 1893.

Before looking at that act, however, we call attention to a provision of the Civil Code, section 470, which declared that no railroad corporation should use any street, alley or highway, or any of the land or water within any incorporated city or town, unless the right so to use the same was granted by a two-thirds vote of the town or city authority from which the right must emanate.

The railroad company was seeking that authority by its application, and was manifestly seeking simply to pass through the city of Fresno along these streets on its way to Bakersfield.

On March 23, 1893, the legislature of California had passed an act providing for the sale of railroad and other franchises in municipalities and relative to granting of franchises by which

it was provided that every franchise or privilege to erect or lay telegraph or telephone wires, and construct or operate railroads along or upon any public street or highway, or to exercise *any other privilege* whatever hereafter proposed to be granted by the board of supervisors, etc., should be granted under the provisions of this act and not otherwise.

Then followed provisions for the sale of these franchises, which was the first of the California acts providing for such sale.

See Stats. of 1893, p. 288.

The claim was that this application came within the provisions of the statute of 1893, and the board was proceeding to sell the franchise when this petition was presented to the supreme court of California to compel the board to act upon the application. And the question was, whether the franchise came within the provisions of the statute of 1893, and the supreme court of California held that it did not, and gave amply sufficient reasons therefor. Said that it referred to franchises where there could be a real competition, and that an application which was to effect the passage of a railroad from one city in the state to another, through some other city, that a right of way through its streets for the purpose of proceeding on its route admitted of no compe-

tition, and was not the subject of a sale. But we call special attention to this language:

> "It cannot be denied that the language of this act is broad enough to include the franchise and privilege which the petitioner seeks. But a statute will not always be held to include every case which falls within its literal terms. * * * The word 'railroad' is certainly broad enough to cover a steam railroad, and the privilege of laying and operating a steam railroad through a city is clearly included in 'any privilege whatever', but at the same time, if it is perfectly evident from the whole design of this act and other acts that the legislature could not have intended the consequences of a literal construction of the language above quoted, such a construction cannot obtain."
>
> *Id.* p. 547.

In many cases the term "railroad corporations" has been held to include street railroads.

People v. Brooklyn etc. Ry., 89 N. Y. 75;

City of Chicago v. Evans, 24 Ill. 502;

In re S. S. v. Ry. Co., 115 N. Y. 442;

Johnston, Administrator, v. Louisville City Ry. Co., 10 Bish. 231;

Hestonville R. R. Co. v. Philadelphia, 89 Pa. St. 210;

Melvilleborough v. Ferguson Ry. Co., 131 Pa. St. 16;

C. N. Bank v. W. A. Ry. Co., 13 Allen (Miss.) 105;

City of Quincy v. Ry. Co., 37 Ia. 61.

The cases cited by the counsel for the appellees supposed to be to the contrary, are simply illustrations of what the supreme court of California has said in the Craycroft case, and Ferguson case. They have passed upon the interpretation of particular statutes, under the circumstances of each case, and have under consideration particular powers or purposes, or the effects of such construction upon the rights of abutting owners.

The case of Chicago & N. W. Ry. Co. v. M. R. & K. E. Ry. Co., 37 L. R. A. 856, was of this latter character, and the question was whether or not the railway under consideration imposed an additional burden upon the property of an abutting owner, owning to the center of a street, for which it was entitled to compensation.

We may say, however, that here in this state it has been settled that the construction of an ordinary commercial railway in the streets of a city does not impose an additional burden entitling the owner of abutting lots to compensation.

Montgomery v. Santa Ana-Westminster Ry. Co., 104 Cal. 186.

And the same is true of the construction of street railways.

It follows upon these authorities that whether or not the act of 1901 authorized the granting of such a franchise as this, is a question of the construction of the terms of this particular statute,

and that construction is not controlled by the mere use of the terms "street railroads" nor simply "railroads", but is to be ascertained from a view of the whole act.

These terms do not compel us to a conclusion as to the particular motive power employed, or the uses to which they are devoted. The power here given is to construct or operate street railroads * * * to erect poles or wires for transmitting electric heat and power and finally to exercise any other privilege whatever hereafter proposed, etc.

Now there is nothing in the nature of ordinary commercial railways that precludes them from exercising the powers and franchises of a street railway company, within the limits of a city, though they may extend across the continent. This is shown by the statutes of this state, and by the decision of the supreme court in Buswell v. Southern Pac. Company, 114 Cal. 445.

That company was organized under the act of May 20, 1861 [Stats. of 1861, p. 607 *et seq.*], and in section 21 [*Id.* p. 618], power was given to boards of supervisors and common councils, etc., to give, grant or donate to any railroad corporation then or thereafter organized under the laws of the state, the use of any of the streets or highways which might be absolutely necessary in order to enable such company to reach an accept-

able point for a depot in any city, city and county, city or town, or to pass through the same, on as direct a route as possible, to accommodate the traveling and commercial interests thereof. And it contained this provision:

> "Provided, however, the provisions of this section shall not apply to any street railroad now constructed or hereafter to be constructed in any of the incorporated cities of this state, nor shall any railroad company who may avail themselves of the provisions of this section ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city."

Now it would scarcely have been necessary to make this prohibition if the term " railroad " and "railroad corporation" did of themselves exclude the exercise of the powers of a street railway company.

The case of Buswell v. the Southern Pacific Company above cited, was an action for a mandatory injunction to compel that company to grant to persons in the city of Oakland the right to ride on defendant's trains on 7th street without compensation. This application was denied, and the supreme court said the general public did not have any such right; that the provision of the act of May 20, 1861, above referred to, was passed for the very purpose of preventing these railroad corporations from entering into

competition with the local street railways, and to hold that they were bound to carry passengers for nothing was to defeat the very object the statute had in view. But it is nowhere intimated that but for that prohibition there was anything to prevent this railroad corporation from carrying passengers from one point to another in the city, and charging fares therefor.

The provisions of the act of 1861 were carried into the Code as originally adopted. [C. C. Sec. 471.] But it was repealed in 1878, and has never been re-enacted since, and there is now no such prohibition.

But here, both by the statute and the supreme court decision it is clearly implied that the fact that a railroad corporation may be a general commercial railway for the purposes of transportation of passengers and freights to various parts of the country does not prevent it from also acting as a street railway within the limits of a particular city.

In Newell v. Minneapolis, Lynndale & Minnetonka Ry. Co., 35 Minn. 112; s. c. 59 Am. Rep. 303, it was directly decided that the fact that a railway was operated in a city or town, and also to points outside of the city or town, did not prevent it from being a street railway within the city.

We quote the following passage, 59 Am. Rep. 307:

> "Upon its findings of fact the trial court was of the opinion, and so found, as conclusions of law, (2) that defendant's railway constructed and operated on First avenue, south and elsewhere within the limits of the city as bounded when this action was commenced, was and is a passenger street railway, and its character is not changed by the fact that between some point outside of the said city limits and Lake Minnetonka it ceases to be a passenger street railway."

Looking, then, particularly at the provisions of our statute, it will be noticed that in the description of the franchises, the construction and operation of street railroads is not only not limited to the carrying of passengers, but the purposes are not mentioned at all specifically, and if any such limitations exist, it is because "street railroad" *ex vi termini* excludes the carrying of anything except passengers. But even if this were the case, the power is given, and the duty imposed, to grant in the manner prescribed by this statute, any other privilege whatever. And as the supreme court said of this same language in the Craycroft case, these terms are broad enough to include the selling to a street railway corporation a franchise to carry freights in connection therewith. So the question is, does the statute, properly interpreted, warrant the selling of this particular franchise?

Legislatures must be supposed to enact laws in the full knowledge of the manner of conducting

business of public importance particularly, and to bring to the discharge of their duties knowledge of the progress or civilization in every direction, including the methods and facilities of transportation, both of freights and passengers, as well also the carrying and distribution of the mails.

Now for many years the custom of transporting and distributing the mails in the cities of the United States through the medium of mail cars operated upon the common street railways has been in existence, and constantly growing. With the knowledge of the application of electricity as a force to the movement of vehicles, its use has been extended to almost every form of vehicle, and has, in a great measure, already been substituted for steam, horse power, and all other power for the movement of cars upon railway tracks. And it has long since ceased to be limited to the operation of railways within a particular city, but it has itself been one of the chief factors in the business of transportation, that has led to the connecting of towns and cities within comparatively short distances, by railways operated by electricity, and offering conveniences to the public in travel, and in the transportation of freight such as it has never enjoyed before.

And there is probably no city in the United States of the population of the city of Los An-

geles that has so many of these so-called suburban railways. From the city of Los Angeles as a center, these roads extend to nearly all the towns not only in this county, but adjoining counties, and franchises such as the present exist in numerous cases, and by means of them not only may passengers carry their baggage with them from place to place, but the country people all along these lines are enabled to market their produce in any one of many towns, by means of the freight cars operated upon these roads, and these things have been going on for years. It is not unreasonable to suppose that when the legislature was using the terms employed in the statute, it did so in the face of these methods of business, and facilities for transportation already in common use. Not only may we presume that the legislature had these matters in mind, but the courts also take judicial notice of the common practices with respect to the transaction of business which are generally known. They take notice of the system of checking baggage by railroads over several lines to the end of the route; the custom of railroad companies to transfer from one to another, loaded cars for continuous transportation over different lines; the nature and business of mercantile agencies; the methods of transporting accepted by railroads; the changes in modes of business, and new methods of carrying on trade;

the general mode of conveying the public mails; the ordinary powers of cashiers of banks; the powers of superintendents of railroads; the custom of banks to remit by drafts instead of sending specie; that engineers are employed to establish railroad courses, and that railroad trains are directed and controlled by the owners of the road. 1st Jones on Evidence, sec. 133.

And in support of these propositions, or some of them, see,

Isaacson v. N. Y. Central R. R. Co., 94 N. Y. 278; s. c. 46 Am. Rep. 142;

Eaton v. Berry, 33 N. Y. 31; s. c. 38 Am. Rep. 391;

Wiggins Ferry Co. v. Chicago Elevated R. R. C., 5 Mo. App. 347;

Sacalaris v. Eureka & Palisade Ry. Co., 18 Nev.; s. c. 51 Am. Rep. 737.

And courts take judicial notice of whatever ought to be generally known within the limits of their jurisdiction.

1 Greenleaf on Evidence, sec. 6.

In view of these well known methods of carrying on the business of these railways, and of the fact that the bounds of their usefulness are constantly being extended, as is equally well known, it is submitted that the broad language used in this statute was undoubtedly intended to

meet these well-known methods of doing business, and even to go farther than this, and by the use of these terms susceptible as they are of expansion, to keep pace with the constant changes and progress in the facilities for the transaction of business, changes which, once adopted in one place, become almost essential in every other. And it is an exceedingly narrow construction of the statute to say that it did not authorize the sale of those franchises which had thus become among the most useful expedients to meet the progressive demands of the age, and as we have shown that the language employed in these statutes does not necessitate any such strict construction, there exists no reason for any such limitations upon the powers provided for by this act.

II.

The second objection to the proceeding is that two franchises were included in the sale. [Brief of appellees, page 38.]

Of this we had something to say in the opening brief. But the point of attack made by our adversaries in the present brief is that part of the description of the franchise to be sold which, after carrying it to the intersection of Mateo and Palmetto streets, continues thus: "Thence northerly over private right of way to the intersection of Fourth street and Santa Fe avenue."

And it is contended that this private right of way made a break in the route of the proposed street railroad, with these last two words italicised, separating it into two independent parts, and rendering necessary two distinct franchises, which under the act of 1901 could only be sold singly [*Id.* p. 39.]

It will be noticed now that there is no pretense that this route thus described is not one continuous route, and that there would be no break in the operation of the cars or necessity of changing from one to another if the road should be constructed over this private right of way. In other words, the break exists only because a part of the road, if constructed along the route, would go over the private right of way. This objection appears to be founded upon two different grounds:

1. The supposed authority of the case of Beekman v. Third Avenue R. Co., 47 N. E. 277.

2. A lack of power in a street railway company to condemn property for its use.

There is nothing in either of these objections. In Beekman's case, the court had under consideration an act which was providing for the granting with the consent of the local authorities, to construct such roads or extensions of street surface railroads, one of the provisions of which was that whenever such consent should provide for the

sale, at public auction, of the right to construct and operate a *branch* or extension of an existing railroad, such consent shall provide that but one fare shall be exacted for passage over such branch or extension, and over the line of road which shall have applied therefor, etc.

The application was for the sale of two branches or extensions of the same railroad. And the court said, among other things:

> "The first and most important question is whether the common council has the power to make a valid sale of the franchise for more than one branch or extension of an existing railroad at the same sale and under the same bid. Or, in other words, does the statute contemplate that consent may be given to the construction of two or more branches or extensions of an existing railroad in one official act, and the franchises sold together as one upon the same bid?"
>
> 47 N. E., p. 279.

Again:

> "The statute evidently contemplates that what is called a branch or extension of an existing railroad shall be constructed and operated under a franchise applied for by that railroad, and when put in operation the branch or extension shall, for certain purposes, be deemed to be a part of the road making the application, even though the franchise to construct the branch shall be acquired, and a new road operated by another corporation. * * * The language of the statute seems to contemplate the sale of a franchise for a single branch or exten-

sion, and not several branches or extensions grouped together."

Now the court enters into a very full discussion of the provisions of the act, and of the reasons which brought them to the conclusion that the local authorities had no such power, and they said, among other things:

"But perhaps the weightiest reason for this view is to be found in the fact that a sale of the franchise for several branches or extensions of an existing railroad at one time and under one bid would defeat the general purpose of the statute, and enable the common council, in most cases, practically to select the purchaser of the right. This may be illustrated by the situation existing in this case, and which has been very clearly pointed out by the court below. The southerly part of the extension or branch intersecting the main line of the defendant's railroad is practically of no use to any other corporation. This is separated from the northerly branch or extension by a part of the line of the defendant, about half a mile northerly. This north branch in itself would constitute an extensive railroad many miles in length, and other corporations might desire to compete for the franchise for its construction and operation, and yet they would be unable to do so except upon the condition that they also purchase another franchise, and construct and operate another railroad where it would be wholly impracticable. Where several franchises are exposed for sale the successful bidder must buy all, and in case of sale of several branches or extensions of an existing road in

this manner, it is easy to see how all competition at the sale may be practically suppressed."

Id. 280.

They then proceed to show that that would be the case in many instances, and was in that case. These two branches being separated by a distance of half a mile, whoever bought both could make no use of the southerly branch except by running over the main line of the corporation making the application. This the corporation making the application could, of course, do without any difficulty. But if another corporation purchased, it was obvious that although the corporation making the application might also grant its consent to the use of its road, yet that was not at all essential to the power of the common council. If it had the power, such consent was not necessary to its exercise, and in many cases might be withheld. And even when given, the corporation purchasing a branch would necessarily, in many instances, and might in all, be compelled to go to a vast expense which the corporation applying for such branches or extensions would not be required to undergo. For instance, if the purchasing corporation other than the applicant was propelling its cars by electricity, while the applicant corporation was a cable railway, if the electric corporation purchase, even with the consent of the company applying, to the use of its road, it

would be compelled to go to no inconsiderable expense in adapting that road to its uses, an expense which the applicant corporation would not be required to incur.

The case not only is no parallel to the present case, but bears no resemblance to it. As we have already stated, it is not pretended that one corporation purchasing here would have any advantage over another. The break, if it exists at all, exists for one as well as the other. And to get over this private right of way, any corporation purchasing is bound to resort to the same means that any other corporation purchasing would have to resort to, and no other. So that the question resolves itself into a mere naked question of the right of the council to sell, not two franchises, but one franchise to construct and operate a street railway line, provided the route designated requires going over private property at all. It is no more two franchises, we submit, than the ordinary steam railway franchise to construct and operate a railroad across the continent or through the state of California from the northerly end to the southerly, is two franchises.

Hence we say, it might be admitted, and is admitted, that the act of 1901 didn't contemplate the sale of several different franchises at the same time and under the same bid, but it is submitted that this supposed separation into two

franchises is purely arbitrary, and that the question here is not whether the council could sell two franchises under the same bid but whether it can sell one franchise if any part of the route ever touches private property, or a private right of way.

Now, in order to sustain the proposition for which the counsel for the appellees contend, it is claimed that a street railway company or the owner of a street railway franchise cannot condemn a right of way over private property. The language of the brief is, "But we submit that the power of eminent domain cannot be exercised for the purpose of acquiring a right of way on which to build street railway tracks."

Brief of appellees, p. 44.

We are told that the statute law of California upon the subject of eminent domain is contained in Title VII, sections 1237-1263, and that section 1238 specifies the public purposes for which the right of way may be exercised. And we are told, also, that the right of a street railroad company to condemn property must be found in subdivision 4 of section 1238, of the Code of Civil Procedure, or not at all. And then follows the quotation of that subdivision. [Brief, p. 44.]

It is perfectly obvious from the quotation that the power is explicitly given. Among the purposes for which this right may be exercised as

defined in this subdivision 4, are: "for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric and horse railroads." And then we are gravely told that the term "street railroads" is not found in that provision, and of course, the counsel is here returning to his proposition that the term "railroads" has not only a distinct meaning, but that that meaning does necessarily exclude from its purview "street railroads." As we have said before, this is not the case, and in this subdivision we have electric and horse railroads. But a horse railroad which is not also a street railroad is, so far as we are advised, a thing utterly unknown.

But this is not the only source of power of these railroad companies to exercise the right of eminent domain. In the enumeration of the powers of railroad corporations in the Civil Code, section 465, provisions are made for the condemnation of property by those companies for various purposes. They may cross, intersect, join or unite their railroads with any other railroad at any point upon its route and upon the grants of such other railroad corporations, with necessary turnouts, sidings, switches, etc., and if the two corporations cannot agree upon the amount of compensation to be made therefor, then the same is to be ascertained and determined as provided in Title VII, part 3, in the Code of Civil Pro-

cedure, which is the title and part providing for the exercise of the right of eminent domain.

C. C., sec. 465, sub. 6.

Subdivision 7 gives the power to condemn to obtain lands, timber, sand, gravel and other material to be used in the construction, etc.

And the provisions of this Title VII on railroads generally, as we have already stated, are declared by section 510 to extend to street railways so far as they are applicable. The power is therefore given, both in the Civil Code and in the Code of Civil Procedure.

And still further: every grant carries with it the power to do those things which are necessary to make the grant effective. The grant of a franchise to construct and operate a street railway necessarily carries with it the right to exercise those powers essential to the enjoyment of the thing granted, and every street railway grant could only be made effective through the exercise of the power of eminent domain or by the purchase from the owner of lands. Independently of the mere laying down of tracks it is, of course, matter of public knowledge that the construction of vast power houses with all the machinery for generating electricity, is necessary to the operation of an electric railway. And moreover, these plants cannot be erected in the streets. They are necessarily constructed on private property. And

if the property cannot be purchased from the owner, the power to condemn must exist, or the franchise be worthless.

So with the cable railways, and even horse railways. Barns and stables and sheds for the shelter of cars not in use, and many other adjuncts, are absolutely necessary to the operation of cars by any motive power, and these things cannot, any of them, be constructed in the public streets. The right to acquire private property by condemnation is essential to the enjoyment of any of these grants.

In Eachus v. L. A. Con. Elec. Ry. Co., 103 Cal. 614, it was held by the supreme court that an electric railway company cutting down the street and changing its grade for the purpose of constructing its road, was liable to the owner of abutting property for any damage done to his property by making such excavation. And certainly if a street railway company has no right to construct its road so as to damage an abutting owner without paying those damages, it could maintain a suit to condemn before it constructs the road. It would be absurd to say that it was an unlawful act to so construct a street railway as to do damage to an abutting owner, and yet the only way it has of constructing it is to commit the trespass or the nuisance, and suffer itself to be sued for damages.

In Bigelow v. City of Los Angeles, 85 Cal.

614, it is manifest that the court entertained no doubt of the power to condemn. That was a suit to enjoin the construction of a viaduct across the Los Angeles river, and over which it was proposed to operate a cable railway as well, and the Los Angeles Cable Railway Company was one of the parties respondents in that case, though not named in the report of the proceedings. It was an appeal from an order refusing a preliminary injunction, which injunction was refused, though mainly because the plaintiff had sat still until the work was almost completed and was about to be put in operation. And as it was a viaduct over one of the principal thoroughfares of the city, and a street railway was to be operated over it for the benefit of the public, and it not being claimed that the parties were not responsible in damages, the court refused to grant a preliminary injunction, and the supreme court, while affirming that order, said:

> "Counsel for appellant seems to fear that unless the city is compelled to make compensation before the work is completed, plaintiff will be left without a remedy for the damages sustained by her, the provisions of the Code with respect to eminent domain being the only procedure prescribed for assessing the damages. In Reardon against San Francisco * * * the court said 'if compensation has not been had in condemning the land for the street under the statute for

such condemnation, it can be recovered in an action.' "

85 Cal. 618.

It is submitted that the proceeding is not amenable to the objection here considered.

III.

There was no unlawful discrimination.

Concerning this proposition, we think little more need be added. The power of the legislature to provide for the sale of a franchise for constructing steam railways is as unquestionable as its power to provide for the sale of franchises for street railways. If such an act were passed, and with all the provisions contained in this act, it would hardly be claimed that the power thus given would be ineffectual because impossible to avoid discrimination, yet it is obvious that every person over whose land the route lay would have exactly the same advantage which is claimed to pertain to this owner of the right of way. He himself would not be compelled to condemn his own property. And yet no discrimination would exist, and for this plain reason: he, the owner, is not entitled to anything for passing over his property except a just compensation, and this is a compensation for the damage done him by the mere fact of the construction and operation of

the road over his premises. But that damage he would suffer if he constructed the road himself, and the only difference that would exist in his case would be that in the case of being the purchaser himself, he does not pay himself the damage which he suffers, but he loses it just the same. The one thing is, in legal contemplation, the equivalent of the other. If condemned by another, he receives the legal equivalent for the thing taken. If taken by himself, he suffers the same damage in legal contemplation, and must either compensate himself in the amount bid, or advantages accruing, or not at all. And if any discrimination existed, either way, it would rather be against him who owns the right of way than in his favor.

But the consideration of this question is itself sufficient to show that that is not the character of discrimination which the statute is preventing. Probably no street railway franchise could be devised in which all of those in the city or in the world who might be tempted to bid, would stand on exactly the same footing. Suppose one railway corporation owned a tract of land favorably situated for the construction of a power house to operate the railway along the franchise proposed to be sold, and another company did not own any such site. Surely this would constitute no discrimination. The meaning of the term was not

that the council should take pains to see that all corporations stood on exactly the same footing with respect to the franchise proposed to be sold, but that one should not be favored by the council against another. Already existing advantages or circumstances not contrived by the council nor created by its act, which may be more favorable in the case of one corporation than another, does not fall within the term "discrimination."

Besides, if such a clause might so operate that fact does not appear in the case, and could not be available upon a record where the sufficiency of the bill is alone in question.

Neither is it true that this bill indicates that the right of way has already been acquired for street railway purposes, for if it has, it would not be a private right of way at all, and besides that, would constitute no objections to it. The Civil Code of this state deals with this very question, and itself suggests a complete answer to this claim of discrimination.

Two lines of street railway operated under different managements may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly. But in no case must two lines of street railway operated under different managements occupy and use the same

street or tracks for a distance of more than five blocks consecutively.

C. C., sec. 499.

Now if this alleged private right of way were for street railroad purposes, that does not hinder that another street railway corporation may pass over its way, or even its tracks.

This provision of the statute has been repeatedly before the supreme court of this state, and no question of its validity exists.

In the Los Angeles Traction Company (another street railway company) against Wilshire, 135 Cal. 654, 658-659, which was a suit to recover a subscription to this railway, the court said this:

> "The respondent purchased the right to, and used, the track of another street railway company that had been previously built, for a distance of some eighteen hundred feet, and it is contended that this is not a compliance with the contract to 'build the road.' We think the contract must be held to have been entered into with full knowledge of the law contained in section 499 of the Civil Code, which reads as follows":

Here follows a copy of the section which is quoted, and the court added:

> "The contract was complied with when this section was complied with as to the portion of the line of railway affected by said section."

Now this very provision is itself proof that the supposed discrimination in this case does not

exist. Any railway corporation in the city whose track was included in the franchise for a distance of five blocks, would have the same kind of an advantage in the bidding that is complained of here. And if several different streets which it occupied for a considerable distance were also included within the franchise for a distance of five blocks on each street, so much the more advantage would it have over any other corporation or person who had not a railway already constructed, and also included within the franchise. Hence, according to the theory of our adversaries, the council could not offer a franchise for sale where the route entered anywhere upon the line of an already existing railway belonging to some street railway corporation or individual, because, forsooth, that company or individual would thus have the advantage over others not similarly circumstanced; and yet the franchise is one which the statutes of this state distinctly provide for, and certainly when the legislature was providing for offering such a franchise for sale, it did not intend to circumscribe those franchises within narrower limits than those provided by law. It is not to be thought that the legislature here designed to repeal the provision of the Civil Code on this subject, but nevertheless, that is the effect if counsel's contention be correct.

There is no longer the power to grant the franchise at all except in the manner prescribed

by this act of 1901, and if a franchise cannot be extended on the track of another company at all for a distance of five blocks, or any distance, then there could be no further grant of a franchise in any city in the state of California that would be permitted to occupy the same street and track of another company for any distance at all. It is submitted that this is not the kind of advantage which is prohibited by the clause here under consideration.

Neither does section 1241, C. C. P., offer any difficulty whatever. As we have already shown, the fact that a street is already appropriated to the purposes of one street railway corporation does not prevent its being used by another for a distance of five blocks. Besides, the section referred to does not receive a very strict construction. A particular route sought to be condemned by a railroad company for the use of its road is not rendered unnecessary by reason of the existence of another route equally good and convenient, both for the property owner and the company.

Cal. Cent. Ry. Co. v. Hooper, 76 Cal. 404.

If this private way is a way for a street railway the mode of getting over it is very simple. It is provided for by the provision of the Civil Code already cited and by the procedure described in

Pac. Ry. v. Wade, 91 Cal. 449.

IV.

The bid of the appellant under which it claims to have acquired the franchise was not illegal or void as claimed by appellees' counsel in their brief.

Brief of Appellees, p. 51.

This subject we have fully treated in the opening brief. Counsel for the appellees evidently agree with us that the learned judge of the court below made the most of the provisions of this statute in support of his decree.

A word or two in response to some additional remarks in the brief upon this subject is all that is necessary here.

In Murdock's case, cited in appellees' brief, pages 54-55, the court had adopted its own means to protect itself against the abuse of its own order, and having, as it seems, just reason to believe that some one or more persons intended to outbid all others with a design to embarrass the court, the court ordered the trustee to report two or more persons as the highest bidders upon the express conditions that if he who was reported as the highest bidder did not comply with the terms of the sale, the next highest bidder might be received and considered as the purchaser. Now, would anybody contend that the court was bound to award to the next highest bidder, whatever he may have been construed to be? The court in that case had ample power to effect its own pur-

poses and to protect itself and its officers and the litigants before it against a fraud of any kind. We are dealing with a statute not framed with reference to a particular case, but establishing the regulations by which all cases were to proceed, and it is not denied that the object of this act was to obtain the best price that might be secured for the franchise, and we are not contending that this means that the municipality is free to depart from the mode of obtaining that price which is *prescribed by the statute.*

The question here is, what is prescribed by the statute? We contend that while the term the "next highest bidder" is fairly susceptible of the interpretation put upon it by the learned judge of the court below, it nevertheless is not so explicit as to exclude all other interpretations. And that when it is admitted that under that interpretation the statute may not only be defeated, but actually would have been, and if the decision of the court is correct, has been defeated in this case, then we say, if the language, without doing too much violence to it, is susceptible of an interpretation by which a cheat may be baffled, and the objects of the statute secured, then that interpretation should be adopted, and if we are correct in our interpretation, then we say again, we are not contending that the court can depart from the mode prescribed by the statute, but that is the mode prescribed by the statute.

V.

An ordinance, or resolution adopted and approved in the same manner as an ordinance, was not essential to the granting of this franchise.

Of course the meaning of the counsel here under this subdivision V [Brief, p. 56], is that it must be approved by the Mayor. Of this also we have fully treated, and shall touch only on the points made by the appellees, and not noticed in the opening brief.

The act of 1897 [Stats. of California, 1897, p. 190], it will be observed, antedates the act under which these proceedings were had by four years. The same power which passed the act approved March 27, 1897, passed the act of March, 1901, under which these proceedings were had, and necessarily repeals it so far as the granting of the franchise is concerned, if in conflict with it.

The act of 1901 does prescribe the mode in which the action of the legislative body shall act. The mistake which counsel for the appellees, we submit, are constantly making, is in supposing that the council of this city in proceeding under the act of 1901 is exercising its legislative powers. That the granting of a franchise is, in a certain sense, a legislative act, is conceded, but we deny that the instrument of grant is any more a legislative act than a patent of the United

States or of the state of California for the public lands, is a legislative act. The legislative act in this case is the act of 1901, not the proceedings of the council under those provisions, and we submit once more, that the council is not here acting in a legislative capacity or any other capacity than that of the mere agent or instrument which the state itself has appointed for the purpose of making the sales of franchises. This we have shown in the opening brief.

See pp. 124-128.

The mistake of counsel for the appellees appears in the very use that they make of the provisions of the statute. Thus, on page 59 of the brief, say they: "The necessity for an ordinance adopted by the city council and approved by the mayor or passed over his veto, is to be found not only in the act of March 27, 1897, but also in the city charter of the city of Los Angeles. The charter of the city of Los Angeles provides that all *legislative power* of the city is vested in the council subject to the power of veto," etc.

To make this language applicable, this must be the exercise of the legislative power of the city which we say it is not. But it was the attempt to exercise their legislative power to defeat the rights acquired by the appellant under its franchise, that violated the contract rights of the ap-

pellant, and attempted to divest it of the property which it had acquired. And it is sufficient upon this subject to say again, that such a construction of the statute does just as completely nullify it as to say that "the next highest bidder" must receive a construction that enables any person, at his mere whim or caprice, to defeat the objects of the statute.

The statute says that it shall be struck off and granted to this highest bidder, whomsoever he may be. Counsel say it may do so with the permission of the mayor.

We deem it unnecessary to pursue this argument further, or give any atention to the authorities cited in support of that proposition, for the whole argument is constructed, and the authorities cited, upon an assumed character attaching to the powers herein exercised, which does not exist.

Where the entire procedure is prescribed and regulated by the statute, and this tribunal to whom its administration is committed is imperatively commanded to make the grant, then in making it, it is not exercising legislative power. The statute itself makes the grant, when the conditions upon which the right to it depends have accrued.

VI.

No question has so far been made of the jurisdiction of this court on an appeal direct from the Circuit Court.

Whether this jurisdiction is conceded, or it is thought that the objection may be made at any time, we are not sufficiently advised. But in anticipation of such claim being made, we submit that the appeal could only be taken directly to this court, and the jurisdiction does exist here, and this is fully established.

Union & Planters Bank of Memphis v. City of Memphis, No. 67; same title, No. 221; 189 U. S. 71; 47 L. Ed. 712.

It is respectfully submitted that the judgment should be reversed.

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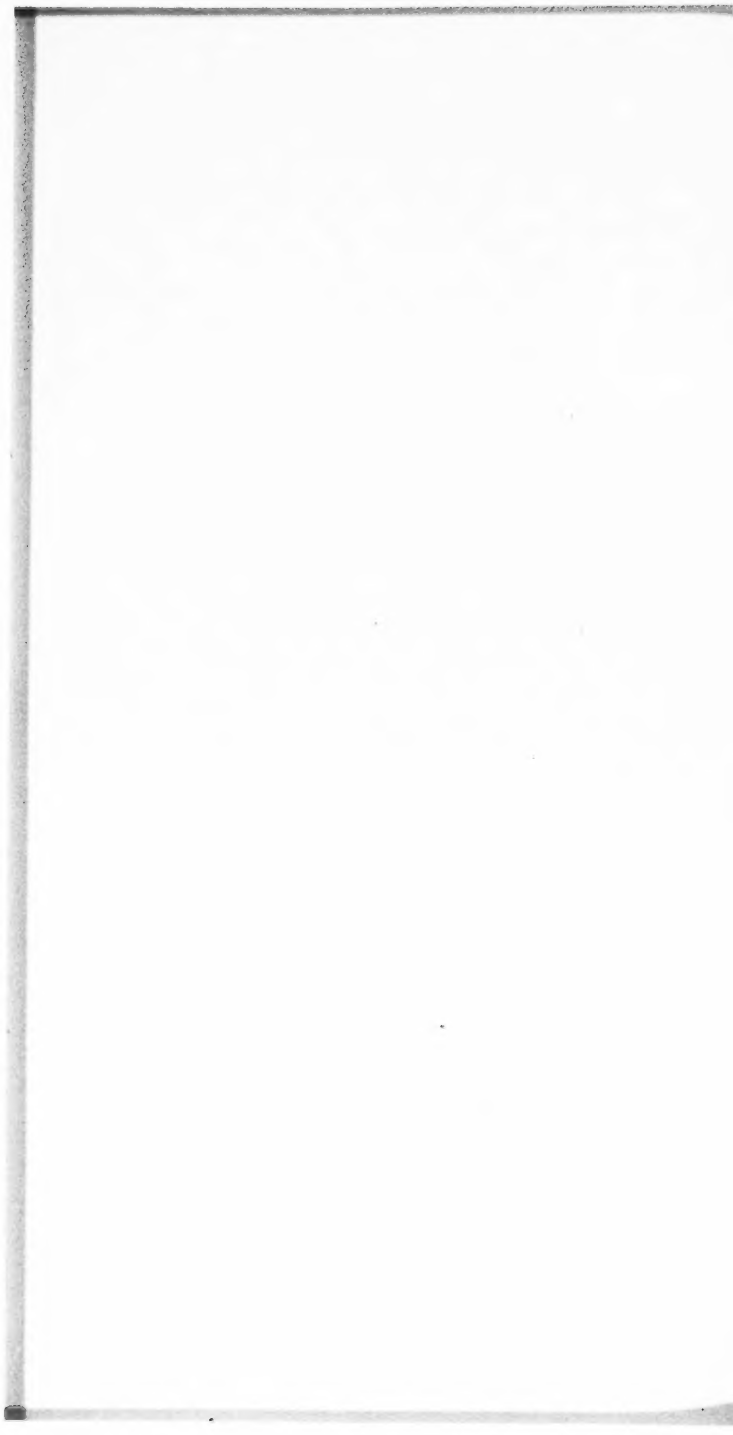
16461

INDEX.

	PAGES
Statement of the case	5—10
Grounds of Demurrer	10
Argument	11—84
The Court has no jurisdiction	11
Under the Impairment Clause	12
Under the Fourteenth Amendment	24
The proceedings for the sale of the franchise were fatally defective and incomplete	32
I. The notice of sale did not conform to law	32
II. Two franchises were included in the sale proceedings	38
III. The sale proceedings were void because of discrimination	48
IV. Appellant's bid was illegal	51
V. An ordinance was essential to a grant of the franchise	56



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Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 175.

Pacific Electric Railway Company,
Appellant,

vs.

The City of Los Angeles, P. W. Powers, W. H. Pierce et al., etc.,
Appellees.

BRIEF ON BEHALF OF CERTAIN APPELLEES, NAMELY, THE CITY OF LOS ANGELES, P. W. POWERS, W. H. PIERCE, GEORGE P. McLAIN, FRANK WALKER, WM. M. BOWEN, A. A. ALLEN, B. S. LOUDER, R. A. TODD, E. L. BLANCHARD, COMPOSING THE COUNCIL OF THE CITY OF LOS ANGELES, AND M. P. SNYDER, MAYOR OF THE CITY OF LOS ANGELES.

Statement of the Case.

This suit was brought in the Circuit Court of the Ninth Circuit, Southern District of California, Southern Division, by the appellant, a corporation organ-

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ized under the laws of the state of California, against the City of Los Angeles, a municipal corporation of that state, the Councilmen and Mayor of the City of Los Angeles, the Los Angeles Traction Company, a corporation organized and existing under the laws of the state of Illinois, Wm. S. Hook and E. A. Davis, to obtain a decree adjudging and declaring that the appellant is the owner of a franchise for the construction and operation of a street railroad upon and along certain streets in the City of Los Angeles; that none of the appellees has any right or title to said franchise; that certain orders and resolutions of the council of the City of Los Angeles purporting to reconsider the vote of said council by which said franchise was granted to the appellant, and all proceedings taken by said council to hinder or impede the appellant in the use and enjoyment of said franchise, are null and void; and that the defendants, and all of them, be restrained from preventing the appellant from constructing said street railroad and exercising the franchise which it claims to have acquired from the City of Los Angeles. [Tr. pp. 24 and 25, fols. 38 and 39.]

The allegations of the bill upon which appellant based its contention that the Circuit Court should interfere in its behalf for the purpose of administering the relief prayed for, are as follows:

That in 1901, the legislature of the state of California passed an act providing for the sale of street railroad and other franchises in municipalities, and prescribing conditions for the granting thereof by the "legislative or other governing bodies" of such

municipalities. [Statutes of California, 1901, p. 265, Tr. pp. 2-5, fols. 4-8.]

That, availing itself of the provisions of this act, the appellant presented to the council of the city of Los Angeles an application for an electric street railway franchise, and said council thereupon advertised the fact of the application, together with the statement that it was proposed to grant the same, and fixed the tenth day of February, 1902, at 11 o'clock a. m., as the time for receiving and opening sealed bids therefor, as required by the act of 1901.

That prior to the time so fixed, four sealed bids were delivered to the city council, to wit, a bid by appellant of $25,000; a bid by Wm. S. Hook of $37,500; a bid by E. A. Davis of $139,000; and a bid by E. Murray of $415,000.

That at the time provided by the notice of sale said bids were opened by the city council, and no higher bid than that of E. Murray being made, the council ordered that said franchise be struck off, sold, and granted to said E. Murray.

That said Murray failed to pay the amount so bid by him, or any part of it, within the time allowed by the act of 1901 for such payment, viz: within twenty-four hours after the franchise had been so awarded.

That the council met on February 11th, and when said period of twenty-four hours had expired, and Murray had not paid the $415,000 bid by him, or any part thereof, the council, by resolution, declared him to be a "fraudulent and irresponsible bidder" and "his said bid null and void."

That thereupon the appellant offered to raise the

bid of $139,000 made by the appellee, E. A. Davis, (which was the next highest bid to that of E. Murray) ten per cent. and to pay for the franchise the sum of $152,900.

That said E. A. Davis claimed that he had become entitled to the said franchise and tendered to said council the amount of his bid, to wit, the sum of $139,000 in gold coin.

That said tender was refused by the city council, and the bid of the appellant was accepted, and, by resolution, it was ordered that said franchise be struck off, sold and granted to the Pacific Electric Railway Company, the appellant, for the sum of $152,900.

That said sum was paid to the treasurer of the city of Los Angeles by said appellant, and was accepted by said treasurer, and by the city council, and that thereupon the appellant executed and delivered to the city council a bond with two sureties, as required by the notice of sale, and the act of 1901, conditioned for the faithful performance of the terms of said franchise, and said bond was by the city council approved and accepted and ordered to be filed in the office of the city clerk.

That thereafter the city council passed an ordinance granting said franchise to the appellant.

That this ordinance was presented to the mayor of the city for his approval, and that he, within ten days thereafter, returned said ordinance without such approval, and with his objections thereto, and on the 21st day of February, 1902, the said city council reconsidered the said ordinance, and upon a vote being taken upon the passage of said ordinance not-

withstanding the mayor's veto, the said council voted against the passage thereof, and thereupon passed a resolution ordering all bids for said franchise, including the bid of the appellant, to be rejected, and directing the city treasurer to refund to the appellant the amount of his bid, and the city clerk to return the bond executed by said appellant.

That said council directed that the original application for said franchise be referred to the board of public works, and instructed said board to re-draft the notice of sale of said franchise.

These proceedings, the bill alleges, were taken by the council upon the theory that an ordinance approved by the mayor was necessary to give validity to the grant of said franchise, while the appellant alleges that under the act of 1901, the council had no discretion in the disposing of said franchise, but were by said act required to grant the same to the appellant, and that no ordinance was necessary to perfect said grant and that the title of the appellant thereto was fully vested under the statutes without the approval of the mayor.

That on the 26th day of February, the council passed an order instructing the mayor, the street superintendent and the chief of police to stop and prevent any attempt that the appellant might make to construct any street railway.

That under the orders of the council, the treasurer of the city offered to return to the appellant, the $152,900 paid by it, and the city clerk offered to return the bond executed by it, but the appellant refused to accept either.

It is alleged in the bill that all of the proceedings of the council purporting to repeal, rescind, vacate, or annul the franchise claimed by the appellant to have been granted to it, or to prevent the exercise of any rights, or privileges, thereunder are in violation of the Constitution of the United States.

To this bill a demurrer was interposed on behalf of the city, and its mayor and councilmen, upon the grounds:

(1) That the Court had no jurisdiction of the subject-matter of the suit;

(2) That there was no equity in the bill;

(3) That the bill was defective in certainty, in that it could not be determined therefrom how many franchises were described in the notice of sale, or offered for sale, or granted pursuant to the notice of sale set forth in the bill.

The Honorable Judge of the Circuit Court, in his ruling upon the demurrer, held that the court had jurisdiction of the case, but that the complainant had never acquired the franchise claimed by it; and it was ordered and decreed that the bill be dismissed for want of equity. From this order and decree the appellant has appealed to this court.

THE COURT HAS NO JURISDICTION OF THIS SUIT.

As the requisite diversity of citizenship does not exist, the court has no jurisdiction of this suit unless it is one which arises under the constitution or laws of the United States.

"* * * the circuit courts of the United States "shall have original cognizance, concurrent with the "courts of the several states, of all suits of a civil na- "ture * * * arising under the constitution or "laws of the United States." [25 St. at L. 433 cap. 866.]

As stated by Chief Justice Marshall, a case "may be "said to arise under the constitution or a law of the "United States, whenever its correct decision depends "upon the construction of either."

Osborne v. Bank of the United States, 9 Wheat 822.

In the case of *Shreveport v. Cole*, 129 *U. S.* 36, the court said:

"Unless this suit was one 'arising under the consti- "'tution or laws of the United States,' the circuit court "had no jurisdiction; and if it did not really and sub- "stantially involve a dispute or controversy as to the "effect or construction of the constitution or some "law, upon the determination of which the recovery "depended, then it was not a suit so arising. Starin "v. New York, 115 U. S. 248, 246; Gold Washing "Co. v. Keyes, 96 U. S. 199."

See also *City of New Orleans v. Benjamin*, 153 *U. S.* 411.

We submit that the bill does not present an actual and substantial controversy as to the effect or construc-

tion of the constitution, or of any law, of the United States, on the determination of which the recovery depends, and, therefore, does not make a case within the jurisdiction of a federal court.

Counsel for appellant contend that grounds for such jurisdiction exist under the provisions of section 10 of article I of the constitution, declaring that no state shall pass any law impairing the obligation of contracts [brief, p. 141], and under the provision of the 14th Amendment prohibiting a state to deprive any person of life, liberty or property without due process of law. [Brief, p. 147.]

I.

The bill does not state a case within the protection of the impairment clause of the Constitution.

Section 10, of article I of the constitution of the United States, provides: "No state shall * * * "pass any * * * law impairing the obligation "of contracts." Concerning this clause of the constitution this court has held that in order to come within the meaning thereof "not only must the obligation of a "contract have been impaired, but it must have been "impaired by a law of the state. The prohibition is "aimed at the legislative power of the state, and not "at the decisions of its courts, or the acts of adminis- "trative or executive boards or officers, or the doings "of corporations or individuals."

New Orleans W. W. v. La. Sugar Co., 125 U. S. 18, 30.

It will be seen from this case that the impairment must be "by a *law* of the state," and that "the prohibi-" tion is aimed at the *legislative* power of the state."

The acts complained of in the bill, as impairing the obligation of the contract claimed by the appellant, are the actions of the council of the city of Los Angeles, reconsidering the ordinance purporting to grant a franchise to the appellant, after the same had been vetoed by the mayor; its vote against the passage of said ordinance over the mayor's veto; its adoption of resolutions rejecting all bids and directing the city treasurer and the city clerk, respectively, to refund and return to the appellant the amount of its bid, and the bond executed by it; also the order of the council directing the original application for said franchise to be referred to the board of public works for the re-draft of a notice of sale thereof; and the subsequent order of the council instructing the mayor, the street superintendent and the chief of police to prevent the construction by the appellant of any street railway.

We submit that none of these acts has the form or semblance of law, or purports to be law. The contract claimed by counsel to exist and to be impaired, is one which, if it existed at all, (which we do not concede) arose when the franchise was struck off to appellant, or, at least, when the money was paid and the bond filed, and a subsequent failure or refusal on the part of the city council to pass an ordinance over the mayor's veto could not be a law impairing the obligation of a contract whose existence did not depend upon the passage of an ordinance. No authority is cited, and

we think that none can be found, to sustain the proposition that the order rejecting all bids, the order referring the petition to the board of public works, or the order to the mayor, the street superintendent, and the chief of police was a law. The only method of enacting a law possible to the city of Los Angeles is by ordinance approved by the mayor, or passed over his veto. The charter of the city provides, that, "all legis- "lative power of the city is vested in the council "* * * and shall be exercised by ordinance; other "acts of the council may be by order upon motion" [*Sec.* 12, *Art. III, City Charter, Stats. Cal.* 1889, *p.* 456]; and by *Section* 15 of the same instrument, the enacting clause of all ordinances is required to be substantially as follows: "The mayor and council of the "city of Los Angeles do ordain."

None of the orders complained of has the form of an ordinance or purports to be an ordinance. The mode of exercising the legislative power of the city being prescribed, that mode is restrictive—no other mode could be followed—and no authority of the state exists for the performance by mere order, as described in the bill, of acts having the effect of laws; and, therefore, such orders cannot be regarded as laws of the state within the meaning of the constitutional prohibition against the passage of laws impairing the obligation of contracts.

"Acts of legislation by a municipal corporation "which are to have continuing force and effect, must "be embodied in ordinances, while mere ministerial 'acts may be in the form of resolutions. * * * "But where the charter requires an act to be done by "ordinance, or where such requirement is implied, as

"it is here, by necessary implication, a resolution is "not sufficient, but an ordinance is necessary." (Citing cases.)

Chicago, etc., R. Co. v. Chicago, 51 *N. E.* 596.

In the case of *Hamilton Gas Light Co. v. Hamilton,* 146 *U. S.* 458, it was held that acts of a municipality (even though expressed in the form of an ordinance), not passed under supposed legislative authority, were not laws of the state within the impairment clause.

"A municipal ordinance not passed under supposed "legislative authority cannot be regarded as the law "of the state within the meaning of the constitutional "prohibition against state laws impairing the obliga- "tion of contracts."

Nor are all ordinances, even though passed under authority of the state, laws within the meaning of this clause of the constitution. As was pointed out by Judge Taft in *Iron Muntain R. Co. v City of Memphis,* 96 *Fed.* 113.

"If such ordinance is *administrative,* rather than leg- "islative, then it is not within the constitutional inhi- "bition, even though it impairs the obligation of con- "tracts."

Not only does the bill fail to show any *law* impairing a contract, but it shows that no legal contract subject to impairment existed. The appellant claims to have become the owner of a franchise by virtue of certain sale proceedings under a statute which provides that the franchise shall be granted to the highest bidder at the sale or, in the event of his default, to the next highest bidder, and at the same time the bill affirmatively and expressly shows, as pointed out in the

opinion of the court below, that appellant was neither the highest bidder nor the next highest bidder. Later in this brief we shall more fully set forth this and other particulars in which the sale proceedings are shown on the face of the bill to have been entirely ineffectual for the purpose of vesting such franchise in the appellant.

It is of course obvious that if the bill shows that no contract (subject to impairment) existed, it can present no question under the impairment clause of the constitution. It is not sufficient to give this court jurisdiction, that the bill alleges that contract rights have been impaired.

" * * * the bare averment of a Federal question " is not in all cases sufficient. It must not be wholly " without foundation. There must be at least color of " ground for such averment, otherwise a Federal ques- " tion might be set up in almost any case, and the juris- " diction of this court invoked simply for the purpose " of delay. Thus in *Millingar v. Hartupee*, 6 *Wall.* 258, " it was held that to bring a case within that provision " of the Judiciary Act, which declares that the final " judgment of a state court may be re-examined, where " is drawn in question the validity of an authority ex- " ercised under the United States, there must be some- " thing more than a bare assertion of the exercise of " such authority. In delivering the opinion of the " court the Chief Justice observed: 'The authority in- " 'tended by the act is one having a real existence, de- " 'rived from competent governmental power. * * * " 'In respect to the question we are now considering, " 'authority' stands upon the same footing with 'treaty' " 'or 'statute.' If a right were claimed under a treaty " 'or statute, and on looking into the record, it should " 'appear that no such treaty or statute existed, or was " 'in force, it would hardly be insisted that this court " 'could review the decision of a state court, that the " 'right claimed did not exist.' This language was " used in connection with the first clause of section

" 709 of the Revised Statutes, 'where is drawn in ques-
" 'tion the validity of a treaty or statute of, or an au-
" 'thority exercised under, the United States, and the
" 'decision is against their validity,' but it is equally
" applicable to the next clause, which covers the case
" under consideration, "where is drawn in question the
" validity of a statute of, or an authority exercised
" 'under, any state, on the ground of their being re-
" 'pugnant to the constitution, treaties, or laws of the
" 'United States, and the decision is in favor of their
" 'validity.'

" Applying the principle of this decision to the pres-
" ent case, we think that before we can be asked to de-
" termine whether a statute has impaired the obligation
" of a contract, it should appear that there was a legal
" contract subject to impairment, and some ground to
" believe that it has been impaired; and that to con-
" stitute a violation of the provision against depriving
" any person of his property without due process of
" law, it should appear that such person has a property
" in the particular thing of which he is alleged to have
" been deprived."

New Orleans v. N. O. Water Works Co., 142 *U. S.* 79, 87.

It is true that this court has held that "all that is
" necessary to establish the jurisdiction of the court is
" to show that the complainant had or claimed in good
" faith to have a contract with the city which the latter
" had attempted to impair," and that "whether the state
" had or had not impaired the obligation of this con-
" tract was not a question which could properly be
" passed upon, on a motion to dismiss, so long as the
" complainant claimed in its bill that it had that effect,
" and such claim was apparently made in good faith
" and was not a frivolous one."

City R. Co. v. Citizens Street R. Co. 166 *U. S.* 557, 564;

Illinois C. R. Co. v. Adams, 180 *U. S.* 28, 36.

Yet, this does not mean that a mere general unsupported allegation that the suit is one arising under the constitution of the United States, or that a claim of a contract right ill pleaded or destitute of merit, is sufficient to confer jurisdiction. The jurisdictional allegations must be specific. As was said by Chief Justice Waite, writing the opinion in the case of *Gold Washing and W. Co. v. Keyes*, 96 *U. S.* 199, 201: "It is "well settled that in the courts of the United States "the special facts necessary for jurisdiction must, in "some form, appear in the record. * * * Be- "fore, therefore, a circuit court can be required to re- "tain a cause under their jurisdiction, it must, in some "form, appear upon the record, by a statement of facts, "'in legal and logical form,' such as is required in good "pleading [1 *Chit., Pl.* 213], that the suit is one which "'really and substantially involves a dispute or contro- "'versy' as to a right which depends upon the construc- "tion or effect of the constitution, or some law or 'treaty of the United States."

Speaking of its appellate jurisdiction, this court said in the case of *City of Lampasas v. Bell*, 180 *U. S.* 276, 282:

"This court has only jurisdiction by appeal or writ "of error directly from the circuit court in certain "cases, one of which is when the constitution or law "of a 'state is claimed to be in contravention of the "constitution of the United States.' *Sec.* 5 *of the Judi- "ciary Act of* 1891, 26 *Stat. at L.* 828, *Chap.* 517. But "the claim must be real and substantial. A mere claim "in words is not enough. We said by the Chief Justice "in *Western U. Teleg. Co. v. Ann Arbor R. Co.*, 178 "*U. S.* 239, 44 *L. Ed.* 1052, 20 *Sup. Ct. Rep.* 867; "'When a suit does not really and substantially involve "'a dispute or controversy as to the effect or construc- "'tion of the constitution or laws of the United States, "'upon the determination of which the result depends,

" 'it is not a suit arising under the constitution or laws.
" 'And it must appear on the record, by a statement in
" 'legal and logical form, such as is required in good
" 'pleading, that the suit is one which does really and
" 'substantially involve a dispute or controversy as to a
" 'right which depends on the construction of the con-
" 'stitution or some law of treaty of the United States,
" 'before jurisdiction can be maintained on this
" 'ground.'" (Citing cases.)

The question of the existence of a contract, and the question of its impairment in cases where the decision of the state court is to be reviewed are generally necessarily so closely connected that this court will not undertake to separate them, and in cases brought from a state court, where the impairment of a contract is charged, the existence or non-existence of the contract is, for jurisdictional purposes, treated as a Federal question. [*Yazoo and M. V R. Co. v. Adams,* 180 *U. S.* 1, 15.]

In such cases, the court has deemed itself bound, in determining the existence of a Federal question, to give to the contract alleged to have been impaired, the broadest construction claimed for it. [*Illinois Central R. R. Co. v. City of Chicago,* 176 *U. S.* 646, 656].

The case at bar can be distinguished from one brought to this court on writ of error from a state court where the judgment of that court, by its necessary operation, gives effect to some provision of a state law which is claimed to impair a contract set out and relied upon; in such a case the rule is that this court will take jurisdiction to review the judgment of the state court, and to determine without

reference to the state court's decision whether the contract exists as claimed.

Mobile and Ohio R. Co. v. Tennessee, 153 U. S. 486, 492;

McCullough v. Commonwealth of Virginia, 172 U. S. 102.

In such a case, as was said in *Columbia W. Power Co. v. Columbia Electric Street R. L. & P. Co., 172 U. S. 475, 488,* "It is the duty of this court to deter- "mine for itself the proper construction of the con- "tract upon which the plaintiff relies." The unsuccessful party having made the claim in the state court that his contract has been impaired and the state court having decided that there has been no impairment, the controversy as to the effect or construction of the Constitution or laws of the United States has arisen and it becomes necessary that this court, upon a writ of error to review the decision of the state court, should consider the question whether there was a contract at all as well as the question whether the contract has been impaired, for, as was said in the case last cited: "The question in either case is "whether the contract has been impaired, and that "question may be answered either by holding that "there is no contract at all, or * * * * that "the subsequent legislation did not impair it. These "are rather differences in the form of expression than "in the character of the question involved."

But in cases originally brought in a Federal court, as the Honorable Chief Justice has said, "it is neces- "sary to the exercise of original jurisdiction by the "circuit court that the cause of action should depend

"upon the construction and application of the Consti-
" tution, and it is readily seen that cases in that pre-
" dicament must be rare. Ordinarily, the question of
" the repugnancy of a state statute to the impairment
"clause of the Constitution is to be passed upon by the
" state court in the first instance, the presumption being
"in all cases that they will do what the Constitution and
" laws of the United States require [*Chicago & A. R.*
" *Co. v. Wiggins Ferry Co.*, 108 *U. S.* 18], and if there
" be ground for complaint of their decision, the remedy
" is by writ of error. * * * "

City of New Orleans v. Benjamin, 153 *U. S.* 411, 424.

The case just cited was one originally brought in the circuit court, which came to this court on a certificate from the circuit court of appeals, propounding, among other questions, that of jurisdiction, and the court said:

"But assuming that such repugnacy might be so set
" up as to form an independent ground of jurisdiction
" in the circuit court, it becomes necessary, in order to
" dispose of the inquiry whether such a dispute or con-
" troversy was really involved here, to refer to certain
" legislation of the state of Louisiana."

The court proceeded to examine the state statutes set forth in the bill, and the allegations of the complaint with respect thereto, and decided that "the decision of "the questions involved did not depend on the Federal "Constitution," and the court adverted to the distinction between a case originally brought in a Federal court and one brought to this court upon a writ of error to a state Supreme Court in these words:

" We are not dealing with a writ of error to review
" the final judgment of the highest court of a state in
" a suit wherein the validity of the statute of the state
" was drawn in question on the ground of repugnancy

" to the Constitution of the United States and the de-
" cision was in favor of its validity, but with the orig-
" inal jurisdiction of the circuit court, sought to be
" sustained on the ground that the cause of action
" arose under and was dependent upon the Constitu-
" tion.

"We are of opinion that the case made upon bill and
" answer did not really and substantially involve a dis-
" pute or controversy as to the effect or construction of
" the Constitution, upon the determination of which the
" result of the suit depended."

The circuit court cannot take jurisdiction of a controversy between citizens of the same state unless the complainant sets up in his bill, in *logical and legal manner*, rights arising under the Constitution and laws of the United States, and the inquiry to be made by the court in such a case is whether upon the allegations of the bill a Federal question is disclosed. In the case of *Vicksburg Waterworks Co. v. Vicksburg*, 185 *U. S.* 65, the bill showed that the city had been authorized by statute to make a contract for the erection and operation of waterworks; that such a contract had been made; and that subsequently, but before the term of that contract had expired, a statute was enacted authorizing the city to build its own waterworks, and pursuant thereto, the city called an election for the purpose of authorizing the issue of bonds for the construction of a system of waterworks, and by resolution of its board of aldermen disavowed any further liability under its contract with the water company. The case came to this court from the circuit court, and the question presented was whether the bill disclosed a Federal question so as to give the circuit court jurisdiction. This question the court said must be answered by an

inspection of the bill, and it appearing therefrom that an attempt had been made by subsequent legislation to deprive the complainant of its rights under an existing contract, the case presented was one within the jurisdiction of the circuit court, "*unless the city can "point to some inherent want of legal validity in the "contract.*" The objections to the validity of the contract urged in the brief of the city are stated in the opinion to be those which had been considered by the court in other cases and held to be untenable, and it was decided accordingly that the circuit court had jurisdiction.

The plain inference to be drawn from this decision is that if the city could have pointed out some inherent want of legal validity in the contract as set up in the bill, the cause would have been dismissed for want of jurisdiction. Applying the principle of this decision to the present case, we contend that if it can be pointed out that under the facts alleged in the bill no franchise was ever vested in appellant, no Federal question can be presented by an averment that appellant's rights under the franchise claimed, have been impaired and so far as any question under the impairment clause of the Constitution is concerned the bill would be dismissed for want of jurisdiction.

The appellant does not in the bill specifically claim that it has a contract with the city which the latter has attempted to impair. The bill merely sets out in detail the proceedings for the sale of a franchise. There was, as the circuit judge pointed out from an examination of the bill, an "inherent want

" of legal validity" in the proceedings, and consequently the bill shows that no contract ever arose. Under the circumstances we submit that there can be no opportunity to invoke the rule that a claim by the complainant in good faith of the existence of a contract will support the jurisdiction of this court under the impairment clause of the constitution. It cannot, we think, ever be said that in a case *orginally brought in a Federal court* a pleader will be deemed to claim in good faith to have a contract which his own pleading affirmatively shows does not exist. In such cases the rule is that the existence of the contract or the claim of its existence must be made to appear by a statement "in " legal and logical form such is required in good plead- " ing."

Gold Washing & W. Co. v. Keyes, 96 *U. S.* 199-201;

Western Union Tel. Co. v. Ann Arbor R. Co., 178 *U. S.* 239;

City of Lampasas v. Bell, 180 *U. S.* 276, 282.

II.

The bill does not state a case within the Fourteenth Amendment to the Constitution of the United States.

The appellant contends that under the provisions of the Act of 1901 it became the owner of the franchise by virtue of the proceedings of the city council described in the bill, concluding with the order of February 11, purporting to strike off, sell and grant the fran-

chise to the appellant, and that these appellees by their unlawful acts are about to deprive appellant of its rights under this franchise without due process of law. On the other hand, the appellees contend that said proceedings were fatally defective, and did not have the effect of vesting title to the franchise in the appellant. These conflicting contentions present the pivotal question of the case, viz: Is the appellant the owner of the franchise involved in this controversy? It is manifest that this question is one, the determination of which depends entirely upon the effect or construction of the laws of California relating to the grant of franchises.

McCain v. City of Des Moines, 174 *U. S.* 168, was a suit in equity by Walter McCain and others against the City of Des Moines and its officials to enjoin them from exercising any jurisdiction for the purpose of taxation over certain territory, known as Greenwood Park, included in recently extended limits of the city. The complainants alleged that the state statute under which the limits of the city were extended was void because in violation of the constitution of Iowa and that to subject the lands of complainants to the threatened taxes and assessments by the city would be to take their property under a void law and contrary to the Fourteenth Amendment to the constitution of the United States. The circuit court sustained a demurrer to the bill on the ground of want of jurisdiction and certified the question of jurisdiction to the Supreme Court for decision. This court affirmed the decree, and in the course of its decision said:

"It is, therefore, quite plain that the complainants "base their case upon the allegation that their prop- "erty is about to be taken from them by the city au- "thorities without due process of law, and in violation "of the Constitution of the United States, because the "act of 1890 violates the constitution of Iowa. That "is a question of law, depending for its solution "upon the law of Iowa, and as to what that law is, "the Federal courts are bound in such a case as this "by the decision of the state tribunal. There is no "construction of the Federal Constitution involved in "that inquiry, nor any question as to its effect upon "the complainants' rights in this suit. The question "whether their property is taken without due process "of law must be decided with sole reference to the "law of Iowa. How can it be said upon such facts "that any question arises under the Constitution or "laws of the United States? The claim of the com- "plainants will not be defeated by one construction of "that clause in the Constitution or sanctioned by the "other. [*Starin v. New York, 115 U. S. 248, "(29:388).*] There is no dispute about construction "in any way whatever; the only question is as to the "validity of the city organization, which, as stated, "is a matter of state law."

In *Manhattan Railway Company v. City of New York*, 18 *Fed. Rep.* 195, the complainants moved for a preliminary injunction to restrain the collection of taxes assessed by the commissioners of taxes and assessments in the City of New York on property owned or leased by the railway company, it being claimed that the state, by the laws under which the assessing officers acted, unlawfully discriminated between the complainants and individuals.

The court said:

"The averments of the bill are intended to make a "case arising under the fourteenth amendment to the "constitution, and if any Federal question is presented

"it arises under that amendment. * * * If the "complainants are entitled to any relief against the "proceedings of the defendants, it is not through any "right which springs from the fourteenth amendment, "but their right is founded on the laws of the state. "The questions which the controversy raises are only "such as are to be solved upon the statutory law of "New York. The suit, therefore, is not one arising "under the constitution or laws of the United States, "and as no diversity of citizenship exists between the "parties, this court cannot decide it. A case does not "arise under the constitution or laws of the United "States unless it cannot be decided without deciding "a Federal question. [*Hartell v. Tilghman*, 99 *U. S.* "547]; or, in other words, unless a Federal law is a "necessary ingredient in the case. [*Osborne v. Bank "of U. S.*, 9 *Wheat.* 738.]"

So, in the case under consideration, the claim asserted by appellant that, without due process of law, it is being deprived of its property, is not founded upon the theory that the laws of California do not afford ample means for testing the legality of the acts complained of, but is based upon the claim that appellant has a vested property right under the laws of the state of which the appellees threaten to deprive it in defiance of those laws.

If, then, it be assumed, as asserted by the appellant, that the acts of the appellees complained of are not sanctioned by the laws of the state, it remains to be considered whether those acts can be imputed to the state so as to make a case within the inhibitions of the Fourteenth Amendment.

In the case of *Manhattan Railway Company v. the City of New York, supra*, the question was whether the state had made or was enforcing by its laws a sys-

tem of taxation which abridged the privileges or immunities of the complainants, or denied to them the equal protection of the law. The court held that there was no discrimination in the laws of the state and, in reference to the acts of the tax officials, that:

"If the authorities of the city of New York are endeavoring to enforce the collection of taxes against the complainants which have not been assessed in conformity with the statutes of the state, if the taxing authorities, under color of law, are proceeding illegally, their action cannot be imputed to the state, and the constitutional provision need not be invoked and does not operate; and the complainants can obtain ample redress under the laws of the state."

In *Virginia v. Rives,* 100 *U. S.* 313, it was alleged that the officer of the state to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, *disregarded the statutes of the state* by selecting white persons only and refusing to select any persons of the colored race, solely because of their color. Upon this point the Supreme Court, after observing that the laws of Virginia made no discrimination against the colored race because of their color in the selection of juries, said:

"But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the state law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state,' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong."

Mr. Justice Field, in a separate opinion, in the case of *Virginia v. Rives, supra,* in which Mr. Justice Clifford concurred, used this language:

"That section," (referring to section one of the Fourteenth Amendment) "is directed against the state. " Its language is that, '*no state* shall make or enforce " 'any law which shall abridge the privileges or immu- " 'nities of citizens of the United States; nor shall *any* " '*state* deprive any person of life, liberty or property " 'without due process of law, nor deny to any person " 'within its jurisdiction the equal protection of the " 'laws.' As the state, in the administration of its gov- " ernment, acts through its executive, legislative, and " judicial departments, the inhibition applies to them. " But the executive and judicial departments only con- " strue and enforce the laws of the state; the inhibition, " therefore, is in effect against passing and enforcing " any laws which are designed to accomplish the ends " forbidden. If an executive or judicial officer exer- " cises power with which he is not invested by law, and " does unauthorized acts, the state is not responsible " for them. The action of the judicial officer in such " a case, where the rights of a citizen under the laws " of the United States are disregarded, may be re- " viewed and corrected, or reversed by this court; it " cannot be imputed to the state, so as to make it evi- " dence that she in her sovereign or legislative ca- " pacity denies the rights invaded, or refuses to allow " their enforcement. It is merely the ordinary case of " an erroneous ruling of an inferior tribunal. Nor " can the unauthorized action of an executive officer, " impinging upon the rights of the citizen be taken as " evidence of her intention or policy so as to charge " upon her a denial of such rights."

In the *Civil Rights Case,* 109 *U. S.* 3, the Supreme Court, having under consideration the first section of the Fourteenth Amendment, said:

"It is state action of a particular character that is " prohibited. Individual invasion of individual rights " is not the subject matter of the amendment."

And, also, that:

" * * * civil rights, such as are guaranteed by " the constitution against state aggression, cannot be " impaired by the wrongful acts of individuals, unsup- " ported by state authority in the shape of laws, cus- " toms, or judicial or executive proceedings. The " wrongful act of an individual, unsupported by any " such authority, is simply a private wrong, or a crime " of that individual; an invasion of the rights of the " injured party, it is true, whether they affect his per- " son, his property, or his reputation; but if not sanc- " tioned in some way by the state, or not done under " state authority, his rights remain in full force, and " may presumably be vindicated by resort to the laws " of the state for redress. An individual cannot de- " prive a man of his right to vote, to hold property, " to buy and sell, to sue in the courts, or to be a wit- " ness or a juror; he may, by force or fraud, interfere " with the enjoyment of the right in a particular case; " he may commit an assault against the person, or com- " mit murder, or use ruffian violence at the polls, or " slander the good name of a fellow citizen; but, un- " less protected in these wrongful acts by some shield " of state law or state authority, he cannot destroy or " injure the right: he will only render himself amen- " able to satisfaction or punishment; and amenable " therefor to the laws of the state where the wrongful " acts are committed. Hence, in all those cases where " the constitution seeks to protect the rights of the citi- " zen against discriminative and unjust laws of the " state by prohibiting such laws, it is not individual of- " fenses, but abrogation and denial of rights, which it " denounces, and for which it clothes the congress with " power to provide a remedy. This abrogation and de- " nial of rights, for which the states alone were or " could be responsible, was the great seminal and fun- " damental wrong which was intended to be remedied. " And the remedy to be provided must necessarily be " predicated upon that wrong. It must assume that in " the cases provided for, the evil or wrong actually ' committed rests upon some state law or state author- " ity for its excuse and perpetration."

Kiernan v. Multnomah, 95 *Fed. Rep.* 849, was a suit by a resident and citizen of the state of Oregon against the sheriff of Multnomah county to restrain the collection of certain taxes for which the sheriff had a warrant, and under which he threatened to sell complainant's property for unpaid assessments. The complainant claimed by his bill that the tax and proceedings were not authorized by the law of the state—that the law was being misinterpreted and being misapplied by the sheriff, and that to sell in the manner threatened would be to take complainant's property without due process of law. The court said:

"The fourteenth amendment has reference exclu-
" sively to state action and not to any action by indi-
" viduals. It is a prohibition upon the state to 'make
" 'or enforce any law which will abridge the privileges
" 'or immunities of citizens of the United States,' or
" 'deprive any person of life, liberty, or property,
" 'without due process of law.' "

The court also held that:

"The questions sought to be presented in this case
" relate to the interpretation to be given a law of the
" state * * * under such cases when there is not
" the requisite diverse citizenship, or amount in contro-
" versy to give the court jurisdiction the remedy for
" the injuries complained of is in the state court. The
" bill of complaint is dismissed."

It appearing, therefore, that the question whether the acts of these appellees, done or threatened, are unlawful, in that they deprive the appellant of property without due process of law, involves only the construction of the statutes of the state, and does not require a consideration of the effect or construction of the Federal Constitution or laws, the bill does not present a case within the protection of the Fourteenth Amendment.

THE APPELLANT DID NOT ACQUIRE THE FRANCHISE IT CLAIMS, NOR HAS IT ANY VALID CONTRACT WITH THE CITY IN RELATION THERETO, FOR THE REASON THAT THE PROCEEDINGS FOR THE SALE OF THE FRANCHISE WERE FATALLY DEFECTIVE AND INCOMPLETE.

I.

The notice of sale did not conform to the requirements of the Act of 1901 in the kind of franchise offered for sale.

According to the allegations of the bill, the application of the appellant was made "under and in pursuance of the provisions of the said act" of 1901 [Tr. p. 5, fol. 8], and asked for "an electric street railway franchise to be constructed and operated upon certain public streets" of the city of Los Angeles [Tr. p. 5, fol. 9], but the notice of sale described a franchise for a railway along streets in Los Angeles to carry passengers and freight. It stated "that the street railroad "constructed and operated under said franchise shall "be used only for the transportation of passengers and "United States mail, and for the transportation, sub-"ject to the conditions and restrictions hereinafter "mentioned, of baggage and such packages and com-"modities as can be conveniently handled and carried "in enclosed cars of the character hereinafter de-"scribed." [Tr. p. 7, fol. 12.] "The conditions and restrictions" referred to are: "That no cars shall be "used on said road, or on any part thereof, for the "carriage of baggage, packages, or commodities, ex-"cept enclosed cars of neat and attractive design and

"construction, and not exceeding in length or width "the cars used for carrying passengers only.

"And provided, further, that no such cars used for "the carriage of baggage, packages or commodities "shall ever be run or operated over any part of said "route hereinbefore described which runs along any "part of Broadway, Main or Spring Streets in said "city." [Tr. p. 9, fol. 14.]

There is an essential difference between the kind of franchise thus described and the kind of franchise authorized by the Act of 1901 and applied for.

The meaning of the term "street railway" is well established in the law of this country, and we beg to call attention to certain authorities upon this subject, including a decision by the Supreme Court of California:

"The difference between street railroads and rail-"roads for general traffic is well understood. The "difference consists in their use, and not in their mo-"tive power."

Williams v. City Electric Street Ry. Co., 41 *Fed. Rep.*, 556.

"A railroad is for the use of the traveling public, in "the transportation of all passengers, baggage and "other freight; a street railway is dedicated to the "more limited use of the local public for the more "transient transportation of passengers only, and "within the limits of the city."

Louisville and P. R. Co. v. Louisville City R. Co., 2 *Duvall* (*Ky.*) 178.

An electric railway in streets intended to be used for the carriage and transportation of passengers, merchandise, baggage, mail, and express matter is not a

"street railway" as generally understood, but is a commercial railway.

Chicago and N. W. Ry. Co. v. Milwaukee, etc., 37 *L. R. A.*, 857.

"The term 'street railroad' applies only to such "roads the rails of which are to be laid to conform to "the grade and surface of the street * * *, "which runs at a moderate rate of speed compared "with commercial railroads, which carries no freight, "but only passengers. * * * "

Bloxham v. Consumers' Electric Light Co., 36 *Fla.*, 539; 51 *Am. State Rep.*, 44.

The constitution of the state of California provides for a state board of railroad commissioners and gives such board the power, and makes it its duty, "to es- "tablish rates of charges for the transportation of "passengers and freight by railroad and other trans- "portation companies."

Art. 12, Sec. 22, Constitution of California, 1879.

In the case of *Railroad Commissioners v. Market Street Ry. Co.*, 132 *Cal.*, 677, the board of railroad commissioners sought a writ of mandate to compel the defendant corporation, a company operating a street railroad in the city of San Francisco, to produce, and permit plaintiffs to examine, its books, records and papers, and the question arose: "Do the words of the "constitution, 'railroad and other transportation com- "'panies' include a street railway company in a mu- "nicipality engaged in the business of carrying passen- "gers on a street railroad?"

The Supreme Court of the state, in the course of its opinion, says:

"The constitution in no place mentions street-rail-
" road corporations, although there were many such
" corporations in existence at the time it was framed.
" The Civil Code of the state, at the time, in title III
" [Secs. 454-491], contained many provisions in re-
" gard to 'railroad corporations,' and in title IV [Secs.
" 497-511], treated of and provided for 'street-railroad
" 'corporations.' Those sections of the code so treat-
" ing railroad corporations and street-railroad corpora-
" tions under separate and distinct titles had long been
" a part of the law of the state. Therefore, we must
" presume that (constitutional) convention—in which
" there were many lawyers of ability—knew that the
" two classes of corporations had long been known by
" the legal profession, and treated by the people,
" through their legislatures, as separate and distinct—
" the one being engaged in the commercial business of
" carrying freight and passengers over the quasi-pub-
" lic ways from one part of the state to another, the
" other in carrying passengers only in the larger mu-
" nicipalities of the state, the one obtaining its fran-
" chise from the state, the other from the municipal au-
" thorities of the town or city in which it was carrying
" on its business."

The Act of 1901 contains no provision for the grant of a franchise to construct and operate a commercial railway running between points within the limits of a city. It expressly includes "street railroads," and excludes "steam railroads" from its operation, and, according to the authorities submitted by us a "street railroad" is dedicated to the use of the public for the carriage of passengers only, while the term "steam railroad" applies to all roads used in the transportation of passengers, baggage and other freight, without regard to the motive power.

Under these circumstances the notice of sale was irregular and unauthorized, and invalidated the sale made thereunder.

The object of the notice of sale is to secure the attendance of purchasers and thus obtain a fair price for the franchise as the result of competition. To attain this object, it is important and necessary that the notice should be free from mistakes or irregularities which are calculated to deter or mislead bidders, or to depreciate the value of the franchise, or to prevent it from bringing a fair price, for, as stated in the note of Mr. Freeman to *Hoffman v. Anthony*, 6 *R. I.* 282; 75 *Am. Dec.* 701, "such mistakes or omissions will be fatal to " the validity of the notice, and also to that of the sale " made pursuant thereto."

In a case of a sale of land under a power contained in a mortgage, where the tract advertised was stated to contain four acres more than the tract embraced in the mortgage, it was held:

"If, therefore, the power of sale conferred by the " mortgage is not strictly and fairly pursued; if the " execution of the power is tainted with fraud; or if " any mistake is made in conducting the sale adapted " to mislead those who might desire to purchase, so " that the sale, if at auction, occurs under circum- " stances calculated to depreciate the value of the prop- " erty to be sold, or prevent it from bringing a fair " auction price, the sale will be held invalid."

Fenner v. Tucker, 6 *R. I.* 551.

In a case where an act of mortgage describes the land as containing 640 acres, it was held that the mortgagee will not be allowed to proceed to sell the property under an order of seizure and advertisement

describing the land as containing 640 superficial arpents, the court saying:

"Such proceedings are entirely inadmissible, and "lead to inextricable difficulties. Not only the interest "of the parties, but that of the public who are invited "to become purchasers, requires that they should not "be countenanced."

Wright v. Russel, La. An. Vol. 5, *p.* 126.

In a case where the advertisement of sale of mortgaged premises under a power, stated that the premises were to be sold for defaults of three mortgages, where there were only two, the third being on other land, it was held that:

"Such a false allegation tended to deceive the public "as to the extent of the incumbrances, and to deter "purchasers from bidding."

Burnett v. Dennister, 5 *Johns.* 35.

The value of a street railway franchise, pure and simple, is susceptible of determination, at least approximately, but if it be coupled with a privilege which is illegal and which may or may not affect the validity of the franchise, according as the courts may subsequently decide, bidders would either be deterred from bidding at all or would refuse to offer for the franchise what it should bring if properly advertised for sale. This point is well illustrated in the case of *Fenner v. Tucker, supra.* If the quantity of land to be sold had been correctly advertised, but the deed had included four acres more than the tract embraced in the mortgage, the mistake, we presume, would not have affected the purchaser's title to the mortgaged premises.

So, in a proceeding under the Act of 1901, if the

notice of sale should describe a franchise for a street railroad, but the grant should include rights and privileges which might only be enjoyed under a franchise for a steam or commercial railroad, the grant would, no doubt, be good for the purpose of conveying a franchise for a street railroad to carry passengers only, although void in respect to the rights and privileges pertaining to a steam railroad. The trouble in the case of *Fenner v. Tucker supra,* as in the case at bar, was that the irregularity was contained in the notice of sale, which was jurisdictional, and was such as would probably discourage bidding and depreciate the price by begetting uncertainty in the minds of the bidders whether a grant based on the notice would convey title to the property.

Hence, we contend that the inclusion in the notice of sale of a more extensive privilege than the council could grant, was "fatal to the validity of the notice and also to that of the sale made pursuant thereto."

II.

Two Franchises were included in the sale proceedings at one time.

Referring to the bill, the court will find that the description in the notice of sale of the route of the contemplated street railway carried it to the intersection of Mateo and Palmetto streets; "thence northerly "over private right of way, to the intersection of "Fourth street and Santa Fe avenue, etc." [Tr. p. 6, fols. 10-11.]

We contend that this private right of way constituted an absolute break in the route of the proposed *street railroad,* separating it into two independent parts, and rendering necessary two distinct franchises, which, under the Act of 1901, could only be sold singly. The jurisdiction of the municipal authorities in granting a street railway franchise under that Act must, in the very nature of things, be restricted to streets and highways. The franchise gives the right to the grantee to enter upon and dig up the streets named in the franchise, lay down ties and rails and operate cars over the same, but when he comes to private property, even though included in the description of the route, he must stop, because the franchise does not give him the right of way over the private property.

In support of our contention upon this branch of the case, we beg to cite *Beekman v. Third Avenue R. Co.,* 153 *N. Y.* 144; 47 *N. E.* 277, which construes a statute of the state of New York providing for the sale and grant by the local authorities of franchises for the construction or extension of street surface railroads, and in which the facts are strikingly similar to those in this controversy. One of the questions decided by the court was:

"Whether the common council of the city of New "York can, under the provisions of section 93 of the "railroad law, make a valid sale of more than one "extension of an existing railroad at the same sale, "to be struck off upon one bid, when the said exten- "sions are separated from each other in such a way "that they can only be operated together over the lines "of the said existing railroad."

The defendant company, which was the owner of the existing railroad, applied for the franchise for these extensions and the same was sold and granted to it. In its application it consented that in case any other corporation became the purchaser of the right to construct and operate a railroad upon the proposed branches or extensions, it should have the right, in perpetuity, to use the tracks of the intervening road in order to construct a continuous line of railroad and unite the two branches thus separated into one; and the grant of this right by the defendant was one of the conditions upon which the consent of the local authorities was given, and a part of the thing sold.

The action was brought by property owners against the defendant to perpetually restrain the construction of the proposed branches or extensions.

Upon the question above set forth, it was contended by counsel for the defendant "that there was in fact " but one branch or extension of the defendant's road " contemplated, and but one franchise sold."

The court said:

"This proposition is deduced from the fact that " what are here referred to as two branches or exten- " sions were to be connected by a section of the main " line of the defendant's railroad, about half a mile in " length. * * * With respect to this connecting " link, neither the state nor the city had any franchise " to sell. What the latter advertised and sold was not " the thing which the statute authorized it to adver- " tise and sell, but a part of the defendant's property. " It is quite true that it did all this with the defend- " ant's authority and consent, but the statute con- " ferred no power upon it to act as the defendant's " agent in commingling together public and private

"rights. * * * A purchaser at the sale, other "than the defendant, might succeed in constructing "and operating a continuous line of railroad, but it "could not acquire and would not own a continuous "franchise. The physical structure might be united "and operated by the acquisition of private property, "but the franchises would still remain, as they were "before, separated by the intervening paramount right "which was vested in the defendant."

The court, therefore, decided:

"We think that the consent for the construction of "two branches or extensions of the defendant's rail-"road as one act, conditioned upon a sale at auction of "both under one bid, was not a compliance with the "letter or the spirit of the statute, and was not, there-"fore, a valid exercise of the power conferred upon "the city authorities by the statute."

And as it was held in the Beekman case, that the franchises for the two proposed branch roads were distinct, because the branches were separated by a section of an existing road over which the city authorities, acting under the state law, had and could have no jurisdiction, so it should be held here that the franchises for the two sections of the proposed street railway, on either side of the private right of way, remain distinct because these two sections are separated by the intervening private right of way, over which the city council had no jurisdiction or power to grant a franchise. Furthermore, it should be held in this case, just as was held in the Beekman case, that, although a purchaser at the sale might succeed in constructing and operating a continuous line of railroad, he could not acquire and would not own a continuous street railroad franchise. The physical structure might be

united and operated by the acquisition of the private right of way, but the franchises would still remain, as they were before, separated by an intervening paramount right, with respect to which neither the state nor the city had any street railway franchise to sell.

We contend further that the Act of 1901 contemplates the sale of franchises singly. The object of the Act is, as stated in the brief of counsel for appellant [p. 37], "To dispose of these franchises in the best "manner and for the best prices. * * * To ex- "press it briefly, to sell for a price, and the best ob- "tainable, upon a fair sale, is written all through the "statute, and is unmistakable."

The Act refers uniformly in the singular number to the franchises to which it applies, in providing for the application and the advertisement of the notice of sale; in prescribing the contents of such notice and the manner of bidding and of conducting the sale; in requiring the payment by the grantee of a franchise of a percentage of the gross receipts arising from its use, operation and possession; in prescribing the method of estimating the gross receipts arising from the operation of an extension of an existing system of street railroads; and in requiring "the grantee of every fran- "chise or privilege granted under this Act" to file a bond inuring to the municipality, conditioned for the performance of the terms and conditions of the franchise.

The scheme of the Act of 1901 is very similar to that of the statute construed in the case of *Beekman v. Third Avenue Railway, supra.* Neither law expressly provides that franchises shall be sold singly, but the

language of each, by unmistakable implication, requires this to be done.

"The language of the statute seems to contemplate "the sale of a franchise for a single branch extension, "and not several branches or extensions grouped to- "gether. The provisions for a single fare, for the di- "vision of the gross receipts from joint business, and "the manner of calculating the percentage to be paid "to the city, all point in the same direction."

Beekman v. Third Avenue Railway, supra.

At each of two places, other than the private right of way hereinabove considered, the description in the notice of sale prescribes alternative routes, one over certain designated streets, and the other "over private "right of way" [Tr. p. 7, fol. 11], and counsel for the appellant, in anticipation of an adverse argument on behalf of the appellees, attempt in their brief [pp. 138-9] to justify this alternative arrangement, but they do not defend, nor even refer to, the private right of way above mentioned, which constituted the only route for the construction of the road between the intersection of Mateo and Palmetto streets and the intersection of Fourth street and Santa Fe avenue.

Counsel for appellants contend that the inclusion of private property in the route of the proposed street railway would not divide the franchise into two parts, nor invalidate it, for the reason, as they suggest, that the grantee thereof might acquire the right of way over such private property by proceedings under the power of eminent domain. [Brief, p. 140.]

Counsel seem to take it for granted that the owner of a street railway franchise may condemn a right of

way over any private property traversed by the route of the proposed road, where it leaves the streets. But we submit that the power of eminent domain cannot be exercised for the purpose of acquiring a right of way on which to build street railway tracks. A *street railway* built upon a private right of way would be a curious anomoly. The statute law of California upon the subject of eminent domain is contained in *Title 7, Sections 1237-1263 of the Code of Civil Procedure*, of that state, and Sec. 1238 thereof specifies the public purposes in behalf of which the right of eminent domain may be exercised. The only provisions of that section under which counsel could possibly claim that private property might be condemned for the purpose of constructing and operating street railroads are contained in Subdivision 4, which reads as follows:

"Wharves, docks, piers, chutes, booms, ferries, "bridges, toll-roads, by-roads, plank and turn-pike "roads; paths and roads either on the surface, ele- "vated or depressed, for the use of bicycles, tricycles, "motor-cycles, and other horseless vehicles, steam, "electric and horse railroads, canals, ditches, dams, "pondings, flumes, aqueducts and pipes, for irriga- "tions, public transportation, supplying mines and "farming neighborhoods with water, and draining "and reclaiming lands, and for floating logs and lum- "ber on streams, not navigable."

The term "street railroads" is not found in this provision, and, in view of the well recognized and thoroughly established distinction in the laws of California between commercial railroads, whatever may be the motive power, and "street railroads" [*Railroad Commissioners v. Market Street Ry. Co., supra*], the court

will readily perceive that it was not the purpose of the legislature to include street railroads within the provisions of Sec. 1238 of the Code of Civil Procedure.

In the case of *Thomas & Houston Electric Company v. Simon*, 20 *Oregon* 60, the Supreme Court of the state of Oregon had under consideration the question whether a street railway company could exercise the power of eminent domain under the Oregon statute, which provides that a corporation organized for the construction of "any railway" may appropriate land for right of way, and after pointing out the distinction between a traffic railroad used for the purpose of transporting passengers, baggage and freight, and a street railway, the court said:

"It is not enough that a railway is for a public use " to authorize the taking of private property, but the " taking must be for a public use within the scope of " its undertaking, and the object which it is to sub- " serve. To authorize railroads operated for such pur- " poses to take the private property of the citizen and " appropriate to its use without his consent, the statu- " tory authority for it must be plainly given; other- " wise, the right does not exist. In view of these con- " siderations, we do not think that the provisions of the " statute for the condemnation of a right of way apply " to the plaintiff, so as to authorize it to take private " property without the consent of the owner for its " own use as a right of way."

In *South Beach Ry. Co. v. Byrnes*, 23 *N. E. Rep.* 486, the court said:

"* * * the chief element of a street railway, as " authorized by the Act of 1884, is that it is built upon " and passes along streets and avenues for the con- " venience of those living or moving thereon. Its " fundamental purpose is to accommodate the street " travel, and its motive power is dictated and regulated

" to that end; and while, consistently with its general " object, it may need for switches or storage or stables " or stations the land of private owners, yet that ne- " cessity is only incidental to the main purpose of a " line along the streets accommodating the street " travel. Here, the land of Mrs. Byrnes is needed to " build the main and principal part of the line, only " that it may avoid the streets altogether. The Act of " 1884 stamps an indelible mark upon the corporations " which it organizes. The consent of the local authori- " ties is to be obtained, and that of a certain portion " of the abutting owners; or, in default of the last, the " certificate of chosen commissioners. Every step of " the way, through all the conditions of the act, it " plainly contemplates a railway along the streets and " avenues of a village or city. * * * If we upheld " this contention it might be possible to build a street " railway for a city along a hundred feet of a street " and then condemn the land in the center of the " blocks all the way to its terminus."

In the case of *Dewey v. Chicago & M. Electric Ry. Co.*, 56 *N. E. Rep.* 804 it was said:

"A street railroad is built to accommodate street " travel, and it has no use for private property, except " so far as it may need the same for a side-track, turn- " out or a station, or as an incident to its main line. " The necessity for its condemnation of property must " be a necessity, which is incidental to the main pur- " pose of the line along the street, accommodating " street travel. Street railways are railways on or " upon the streets of a city or town. They have no " right to diverge from the street and condemn pri- " vate property, unless some obstruction or conforma- " tion of the surface of the ground makes such di- " vergence necessary, in order to avoid discomfort or " danger to the travelling public. A street railway " may not, like a steam railway, locate its route, in " order to reduce time and distance for passengers " traveling from town to town across the country. " Such location of its route is not for the accommoda-

"tion of local travel on the highways or streets, and "therefore involves a perversion of the character and "object of street railways. * * * "

Dewey v. Chicago & M. Electric Ry. Co., 56 *N. E. Rep.* 804.

The following paragraph from the decision in the case last cited, is peculiarly pertinent to the point under consideration:

"The corporate authorities of the village of Glencoe "had no authority to authorize a condemnation of "private property. The authority to condemn comes "from the state, and must be derived from the statutes "of the state. The village authorities may refuse to "consent to the use of their streets and alleys by a "street railway corporation, but their consent or re- "fusal to the use of their streets is the extent of their "power. They control the streets, alleys and public "grounds of the village, but they do not control pri- "vate property. Any attempt of the village authori- "ties, by consenting to a particular location of a street "railroad across private property, to cause the street "railroad to diverge from the streets, alleys, and pub- "lic grounds under their control, is void, and confers "no right and creates no necessity."

Counsel profess to be unable to see any difference between an act of Congress or of a state legislature incorporating a railway company and authorizing it to construct its line across the country or state, and a sale and grant by local authorities of a right of way in specified public streets for the purposes of constructing and operating a street railway under a law authorizing such sale and grant.

A company like the appellant, for instance, organized under the general incorporation laws of the state of California, for the purpose of constructing and op-

erating street railways, has the right under its charter to engage in that business in the city of Los Angeles, but until it gets a franchise from the authorities of the city, under another and different law of the state, to-wit., the Act of 1901, it has no right to construct and operate a street railway in the streets of that city. That is, there is a difference between the act of incorporation giving a company existence and clothing it with the right of carrying on a certain kind of business, and an act of the local authorities giving that company the right to transact that business in such locality.

We submit, therefore, that, under any view of the case, there is a break in the continuity of the franchise, making two separate roads and rendering necessary two distinct franchises, which could only be offered for sale and sold singly.

III.

The sale proceedings were void on the ground of unlawful discrimination.

It is submitted that the sale proceedings discriminated in favor of the "person, firm or corporation" owning the private property, or having a right of way across the same, as against any other person, in bidding for the purchase of the franchise, and were, therefore, void, because obnoxious to Section 9 of the Act of 1901, which provides:

"Sec. 9. No clause or condition of any kind shall "be inserted in any franchise or grant offered or sold "under the terms of this act, which shall directly or

"indirectly restrict free and open competition in bid-
"ding therefor, and no clause or provision shall be in-
"serted in any franchise offered for sale which shall
"in anywise favor one person, firm, or corporation, as
"against another, in bidding for the purchase thereof."

If, as the bill indicates to be the case, the right of way had been already acquired for street railway purposes, then certainly the owner of the right of way was the only person who could purchase the franchise and use it as one franchise, because, if the property had already been dedicated to the purpose of constructing a street railway, it was not subject to condemnation for a like purpose by any other person, even if the right of eminent domain is available for the purpose of condemning a way for the construction of a street railway, which we deny.

"Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;
2. That the taking is necessary to such use;
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

Sec. 1241, Code of Civil Procedure of California.

If, however, the private right of way did not exist, then the owner of the private property would be the only person who could purchase the franchise and use it as one franchise, because, as we have shown, his property could not be taken from him by condemnation, and without his consent the road could not be built; or, if the right of eminent domain does exist in such a case, the owner of the property would still enjoy an advantage not possessed by any other person in

his ability to comply with the requirements of the Act of 1901 that the grantee of a franchise should commence work within four months and complete the road within three years from the granting of the franchise, under penalty of forfeiture of the franchise, and loss of the amount of the bond given to secure the performance of the terms and conditions of the franchise.

The fact that appellant's application included the private right of way in the route for which it sought a franchise, shows that appellant was the owner of such right of way for street railway purposes and, therefore, the council by including the same in the route of the proposed road practically selected the appellant as the purchaser of the franchise.

In the Beekman case, the court in support of its construction that the New York statute required franchises be sold singly, in order to avoid discrimination, said:

"But perhaps the weightiest reason for this view is "to be found in the fact that a sale of the franchise "for several branches or extensions of an existing "railroad at one time and under one bid would de- "feat the general purpose of the statute, and enable "the Common Council in most cases practically to se- "lect the purchaser of the right."

IV.

The bid of the appellant under which it claims to have acquired the franchise was illegal and void, and the Council had no power to accept the same nor to sell or grant the franchise thereunder.

This point is exhaustively treated and thoroughly established in the opinion of the Honorable Judge of the Circuit Court [*Tr. p.* 44, *fols. 72 et seq.;* 118 *Fed. Rep.* 746.], and we deem it unnecessary in presenting this point to do more than to state, in outline, the reasoning and conclusions of the opinion, and to reply to some of the matters contained in the brief of counsel for the appellants upon this branch of the case.

The court below prefaced its discussion of the question, whether or not the council complied with the Act of 1901, by adverting to the familiar rule of statutory construction that "mode is the measure of power." [*Fort Scott v. Eads Brokerage Co.*, 117 *Fed. Rep.* 51; *Board v. Templeton*, 51 *Ind.* 266; *Woodruff v. Berry*, 40 *Ark.* 253; *Saddler v. Eureka*, 15 *Nev.* 39; *State v. Cornell*, 52 *Neb.* 25, 71 *N. W. Rep.* 961; *Webster v. French*, 12 *Ill.* 302; *Zottman v. San Francisco*, 20 *Cal.* 97; *McCracken v. San Francisco*, 16 *Cal.* 620; *Heidelburg v. St. Francois County*, 100 *Mo.* 69, 12 *S. W. Rep.* 914.]

The court also called attention to the fact that the provision in section one of the act that franchises "shall be granted upon conditions in this act provided, " and not otherwise," showed an intent to make its provisions imperative [23 *Amer. & Eng. Ency. of*

Law, 1st Ed. 455; *Koch v. Bridges,* 45 *Miss.* 247; *Hurford v. City of Omaha,* 4 *Neb.* 336; *Cooley's Constitutional Limitations, 6th Ed.* 89], and that additional energy was imparted to the mandates of the act by section ten, making penal any violation of the act.

After making a critical examination of the language of section 5, which prescribes the mode of procedure to be followed by the council in granting a franchise under the act, the court said:

"The various steps, for which the section provides, " consecutively arranged, are these: First, opening of " the sealed bids; second, opportunity for further com- " petition, in the manner and upon the terms prescribed " in the section; third, striking off of the franchise to " the highest bidder; fourth, allowance of twenty-four " hours to the successful bidder to deposit the amount " of his bid; and, fifth, in case said bidder fails to make " the deposit, grant of the franchise to the next highest " bidder therefor. I do not mean, that each step after " the first must follow immediately, in point of time, its " nearest antecedent, but, that nothing affecting the " result of the competition can intervene between any " two of said steps. Exigencies may arise, at any " stage of the proceedings, to justify a postponement " or adjournment of the whole matter, but whenever " its consideration is resumed, the order of progression " I have indicated must be adhered to." [Tr. p. 46, fol. 76.]

The court, therefore, held that when the time allowed by law to Murray, the highest bidder, to deposit the amount of his bid had expired, namely, at 3:15 p. m. of Feb. 11th, 1902, and he had failed to make the required deposit, "the action that should have " been next taken is prescribed in the last clause of said " section, already partially considered, which provides, " that, if the successful bidder fails to make the de-

"posit required of him, 'the franchise shall be granted "to the next highest bidder therefor.' When, speaking "concretely, the contingency referred to in said clause, "namely, Murray's failure to deposit the amount of "his bid, occurred, in the afternoon of February the "11th, 1902, it was then the duty of the council to "grant the franchise to the next highest bidder, unless "there was some sufficient reason for a refusal. This "qualification of the council's duty I make because "of the charge in the bill, that the next highest bid "was fraudulent. Assuming the truth of this charge, "which must be done on demurrer, the council ought "not to have granted the franchise to said bidder. "When it refused to do so, however, its power in the "premises was exhausted, because said act of 1901 "makes no provision for any subsequent proceeding, "and the alleged grant of the franchise thereafter to "complainant was without authority and void." [Tr. p. 47, fols. 76-77.]

Counsel for appellant contend that the last clause of section 5, providing that if the highest bidder fails to deposit the amount of his bid within the time prescribed, "the franchise shall be granted to the next "highest bidder therefor," means that upon the default of the highest bidder there should be another competition, and that the franchise should be struck off to him who next bids the highest therefor, and if he also defaults, further competition shall be had, and so on, until the highest bidder at one of these successive competitions actually pays the amount of his bid, and thus becomes, as counsel contend [brief p. 55] the "successful bidder," to whom the act requires that the franchise "shall finally be struck off, sold and granted." In response to a similar argument in the court below, the Honorable Circuit Judge said:

"Complainant's construction of said clause, namely: " 'The meaning fairly is nothing more nor less than " 'this—that it should be struck off to him who next " 'bids the highest therefor,' is, to my mind, wholly " inadmissible and must be rejected. It is inconsistent, " as I have just shown, with the peculiar phraseology " of the clause, and as appears below, does violence to " the general plan of the section. If the legislature had " intended that there should be further competition af- " ter default of the successful bidder, it would have " chosen apt words to express the intention, rather " than language which implies the contrary, and, be- " sides, would have prescribed fully the nature and " duration of the subsequent competition, that is, " whether it was to be by sealed or open bids, and when " it was to close." [Tr. p. 46, fols. 75-76.]

The meaning of the words "next highest bidder" appears to us to be too plain to admit reasonably of more than one interpretation. The word *next,* it seems, is an irregular superlative of near, and may, therefore, be treated as synonymous with nearest, and, in the position it occupies in the phrase, "the next highest bidder," it cannot, we submit, be regarded grammatically as anything but an adverb modifying the adjective highest, so that the evident meaning of the expression is *the nearest highest bidder,* that is, the bidder whose bid is nearest to the highest.

In *Murdock's Case, 2 Bland's Ch. (Md.),* 461; 20 *Am. Dec.* 381 this identical phrase was used with reference to a sale made by a trustee in a foreclosure suit. The trustee sold a parcel of the mortgaged premises to the highest bidder, Elizabeth Murdock, on condition that if she did not pay the amount of her bid on the day the sale was confirmed, the sale would be made

to "the next highest bidder," William Brewer. In approving the action of the trustee, the chancellor said: "* * * where there is a just reason to believe that "some one or more persons intend to outbid all others, "with a design to embarrass the court * * * the "court may order or allow the trustee to report two or "more persons as the highest bidders, upon the ex- "press condition that if he who is reported as the high- "est bidder does not comply with the terms of sale, "the next highest bidder may be received and consid- "ered as the purchaser." And Elizabeth Murdock having failed to pay the purchase money, the chancellor ordered that Brewer, the "next highest bidder," be admitted as the purchaser.

It is, of course, true that the object of the Act. of 1901 is that the best obtainable price may be secured for the privilege which the municipality may have proposed to grant. But this does not mean that the municipality is, therefore, free to depart from the mode of obtaining that price which is prescribed by the statute. It might happen that a better bargain could be made for the performance of a piece of municipal work than is offered by the lowest bidder under a statute requiring all work to be let to such bidder. Yet, this fact, although it might justify the rejection of all bids, would not authorize the letting of the contract to any but the lowest bidder, ascertained in the manner prescribed by the statute. The mode prescribed for the exercise of a power conferred upon a municipality is restrictive and affords the measure of that power. And this is emphatically true, when the statute itself says, as in this case, that the power shall be exercised "upon the conditions in this act provided, and not oth-

"erwise." Whether the method prescribed by the statute is really the best that might have been devised, or is even efficient for the purpose aimed at, is immaterial. As was said by the Circuit Judge in this case, "the rule "is well settled that the language of a statute, when "plain and unequivocal, determines its meaning re- "gardless of consequences." [Citing authorities.]

V.

An ordinance (or resolution adopted and approved in the same manner as an ordinance) was essential to the granting of the franchise.

We submit that under the statutes of the State of California and the charter of the City of Los Angeles, an ordinance adopted by the legislative or governing body of the city, and approved by the mayor, or passed over his veto (or a resolution adopted and approved, or passed, in the same manner) was necessary to the grant of such a franchise as is claimed by appellant.

1. The statutes of California require the grant of a street railway franchise to be made by ordinance or resolution, adopted by the legislative body of the municipality, and approved by the mayor, or passed over his veto.

In 1897 the legislature of the State of California passed an act entitled:

"An Act to require ordinances and resolutions "passed by the city council, or other legislative body, "of any municipality to be presented to the mayor,

" or other chief executive officer, of such municipality " for his approval."

Statutes of Cal. 1897, *p.* 190,

This act became a law by the approval of the governor on March 27th, 1897, and provides as follows:

"Every ordinance and every resolution of the city " council of a municipality providing for * * * " the granting of any franchise, or other privilege " * * * which shall have passed the city council, " shall, before it takes effect, be presented to the " Mayor for his approval. The Mayor shall return " such ordinance or resolution to the City Council "within ten days after receiving it. If he approve it "he shall sign it and it shall then take effect. If he "disapprove it he shall specify his objections thereto in "writing. If he do not return it with such disap- "proval within the time above specified, it shall take "effect as if he had approved it. The objections of "the Mayor shall be entered at large on the journal of "the City Council and the City Council shall cause the "same to be immediately published. The City Council "shall, after five and within thirty days after such "ordinance or resolution shall have been returned with "the Mayor's disapproval, reconsider and vote upon "the same; and if the same shall, upon reconsideration "be again passed by the affirmative vote of not less "than three fourths of all the members, the presiding "officer shall certify that fact on the ordinance or reso- "lution, and when so certified, it shall take effect as if "it had received the approval of the Mayor; but if the "ordinance or resolution shall fail to receive, upon the "first vote thereon after its return with the Mayor's "disapproval, the affirmative votes of three-fourths of "all the members, it shall be deemed finally lost."

In view of the fact that the act of 1901 does not prescribe the mode in which the action of the legislative or governing body of a municipality proposing to grant a franchise thereunder shall be performed and

does not contain anything inconsistent with the act of March 27th, 1897, it must be presumed that the legislature intended that the two acts should be construed together for the regulation of the sale and grant of franchises and privileges by the governing bodies of municipalities. This contention gains strength from the history of the legislation of this State in respect to the sale of street railway franchises. The first act on this subject was approved March 23rd, 1893. [Stats. Cal. 1893, p. 288.] This act was succeeded and supplanted by an act on the same subject approved March 13th, 1897, [Stats. Cal. 1897, p. 135]. Subsequent to the approval of the latter act, and at the same session of the legislature, the act of March 27th, 1897, above referred to, was passed and approved. There can be no doubt that the act of March 27th, 1897, applied to the sale and grant of franchises under the act of March 13th, 1897, because there is no inconsistency between the two statutes. The latter statute simply prescribes the manner in which the act of granting a franchise under the earlier statute shall be performed—a subject upon which the earlier statute was silent. The statute of 1901 in turn supplanted the statute of March 13th, 1897, and like its predecessor, this statute was silent as to the mode in which a grant of a franchise should be made.

As the acts of March 13th, 1897 and March 27th, 1897, were not inconsistent, but supplemented one another on the subject of the granting of franchises and privileges in municipalities, so the act of 1901, being silent like its predecessor upon the subject of the

mode in which such grants shall be expressed, must be construed with the act of March 27th, 1897, as part of one scheme relating to the sale and grant of franchises requiring that grants proposed to be made under the act of 1901 shall be made in the form and mode prescribed by the act of March 27th, 1897, to-wit, by an ordinance or a resolution of the City Council, presented to the mayor and approved by him, or, upon reconsideration, passed over his veto.

2. The charter of the city of Los Angeles requires that the grant of a franchise shall be made by ordinance, adopted by the city council and presented to and approved by the mayor, or passed over his veto.

The necessity for an ordinance adopted by the city council and approved by the mayor, or passed over his veto, is to be found not only in the act of March 27th, 1897, but also in the city charter of the city of Los Angeles.

The charter of the city of Los Angeles provides that "All legislative power of the city is vested in the "council, subject to the power of veto and approval by "the mayor as hereinafter given, and shall be exer-"cised by ordinance; other action of the council may "be by order upon motion."

City Charter, Sec. 12, *Statutes of Cal.* 1889, *p.* 456.

"The enacting clause of all ordinances shall be sub-"stantially as follows: The mayor and council of the "city of Los Angeles do ordain as follows:"

City Charter, Sec. 15, *Statutes of Cal.* 1889.

Sec. 16. "Six members of the council shall con-"stitute a quorum for the transaction of business, but

" no ordinance shall be passed or other act done grant-
" ing a franchise, making any contract, auditing any
" bill, ordering any work to be done, or supplies to be
" furnished, disposing of or leasing the city property,
" ordering any assessment for street improvement, or
" building sewers, or any other act to be done involv-
" ing the paying of money, or the incurring of debt by
" the city, unless two-thirds of the members of the
" whole council vote in favor thereof. All other ordi-
" nances may be passed by a vote of a majority of the
" whole council."

Sec. 37. "Every ordinance which shall have been
" passed by the council shall, before it becomes effect-
" ive, be signed by the city clerk or other person au-
" thorized by the council to sign the same on its be-
" half, and be presented to the mayor for his ap-
" proval and signature, if he approves it; if not, he
" shall indorse thereon the date of the presentation to
" him and shall return it to the city clerk with his ob-
" jections in writing. The city clerk shall indorse
" thereon the date of its return to him, and shall at
" the first meeting of the council thereafter present the
" same with the objections of the mayor, to that body.
" Thereupon the council shall proceed to reconsider
" the passage of the ordinance. Upon such reconsider-
" ation, in all cases where the votes of two-thirds of the
" whole council are required to pass the ordinance in
" the first instance, it shall require the votes of three-
" quarters of the whole council to pass the ordinance
" over the mayor's veto. The vote, in all cases of re-
" consideration, shall be by ayes and noes, and the
" names of the members voting for or against shall be
"entered upon the journal."

Sec. 40. "The council shall also have full power to
" pass ordinances upon any other subject of municipal
" control or to carry into effect any other powers of
" the municipality."

These provisions leave no room for doubt that the grant of the right or privilege to construct and operate a street railway in the city of Los Angeles must be

made by an ordinance adopted by the city council and approved by the mayor, or passed over his veto, because, in the first place, such right or privilege is a franchise within the meaning of Sec. 16 of the city charter, and, in the second place, such grant is a legislative act.

Prior to the enactment of the Franchise Act of 1893 [*Stats.* 1893, *p.* 288], heretofore referred to, no definite scheme for the sale of franchises to the highest bidder had been provided by the legislature, but Section 497, in the title "Street Railroad Corporations," of the Civil Code of California, as amended in 1876 and 1891, provides that "authority to lay" (street) "railroad tracks through the streets * * of any "incorporated city * * may be obtained from the "trustees, council or other *body to whom is intrusted "the government of the city* * * upon such "terms * * as the city or town authority may "provide * * "

This section of the Code, providing that authority to lay railroad tracks may be obtained from "the body "to whom is entrusted the government of the city," subjects the granting of such authority to municipal control, and the acts of 1893, March 13th, 1897, and 1901, prescribe the conditions under which franchise "hereafter proposed to be granted by boards of super-"visors * * or other governing or legislative "bodies * * shall be granted."

Nothing is expressly said in Section 497 of the Civil Code, or in any of the three acts referred to about the manner in which franchises shall be granted; but

speaking of Section 497, Civil Code, the Supreme Court of this state, in the case of *Eisenhuth v. Ackerson*, 105 *Cal.* 87, said:

"There was no necessity for providing the mode or "manner of the grant, so long as the legislature was "content with the modes already provided by the "charters of the different cities and towns in the "state, although the governing bodies of such cities "and towns were differently constituted and governed "by charters prescribing different modes of municipal "legislation."

And the court held that there was nothing in the provisions of Section 497 of the Civil Code inconsistent with that section of the Consolidation Act of San Francisco (its legislative charter), which provided that every ordinance or resolution of the board of supervisors granting any privilege, "after the same "has passed the board, shall, before it takes effect, be "presented to the president of the board" (the mayor) "for his approval," and that, if he returns it without such approval, it may be passed by a two-thirds vote over his objections. And, it appearing that the mayor's veto of the ordinance granting to the plaintiff a franchise to construct a street railroad had been sustained by the board of supervisors, the court held that the defendant street superintendent should not be enjoined from preventing the construction of said railroad.

To this judicial construction of the language used in Section 497 of the Civil Code, which, as has been shown, is paraphrased by the language of the Act of 1901, may be added what may be considered a legislative construction thereof, to be found in Section 502

of the Civil Code, which was amended in 1895, subsequent to the decision of the case of Eisenhuth v. Ackerson, *supra,* and at a time when the franchise act of 1893 was in force.

That section provides that:

"Work to construct the railroad must be commenced in good faith within not more than one year "from the date of the taking effect of the *ordinance* "granting the right of way, and said work must be "completed * * " etc.

Civil Code, Sec. 502.

In the case of *Thompson v. Supervisors of Alameda County,* 111 *Cal.* 553, the court had under consideration the Franchise Act of 1893: *"An act providing "for the sale of railroad and other franchises in mu- "nicipalities, and relative to granting franchises,"* and also the County Government Act of 1893. The Franchise Act of 1893 was the first of the three statutory schemes that have been enacted in this state for the sale of franchises to the highest bidder. It went into effect on March 23d, 1893, and the County Government Act of that year went into effect upon the following day. Section 25 of that act declared what were the general permanent powers of boards of supervisors, and a subdivision thereof gave to such boards power "to grant franchises * * * upon such "terms and conditions and restrictions as, in their "judgment, may be necessary and proper. * * * "

It was urged by the defendants in that case that the Franchise Act of 1893 was unconstitutional because it attempted to deal with franchises issued by counties at the hands of their respective boards of supervisors,

while the title of the act was not broad enough to include counties. And that, if this were not true, the act was repealed by the County Government Act which took effect subsequently and gave power to boards of supervisors to grant franchises upon such terms as they judged necessary and proper. But the court held that the title of the Franchise Act was broad enough to cover all the legislation found in it, and that it was therefore applicable to counties, and that there was no such inconsistency between the Franchise Act and the County Government Act as to call for the determination by the court that the former was repealed by the latter. "Full force and effect may be given to "both," the court said, "the franchise may be sold to "the highest bidder and still the terms, conditions and "restrictions upon which the franchise will be granted "may be fixed by the board of supervisors under its "general permanent powers."

Section 16 of the charter provides that "no ordi- "nance shall be passed * * * granting a fran- "chise * * * unless two-thirds of the members "vote in favor thereof," and the charter nowhere provides that a grant of a franchise may be made otherwise than by ordinance. Since, then, the power to grant franchises is conferred upon the city of Los Angeles by the legislature, and the grant of franchises is thereby made a "subject of municipal control" within the meaning of Section 40 of the charter, we submit that it is a necessary and unavoidable implication from the organic law of the city that such power and such control can be exercised by ordinance only.

The case of *Newman v. City of Emporia*, 4 *Pac.* 815, was a suit to restrain the collection of an assessment for street work. The plaintiff claimed that the proceedings authorizing the work to be done were informal—the irregularity being that "what should have "been done by ordinance, was done by resolution." And the court said:

"* * * we think the same ought to have been "done by ordinance. * * * It is true that the "statutes nowhere in express terms require that the "same must be done by ordinance; but we think they "require it by the strongest inference, and by neces- "sary and unavoidable implication. It is true that the "statutes in terms merely provide that cities of the "second class 'are authorized and empowered to en- "'act ordinances' to make such improvements [see "said Section 32], and not anywhere in terms pro- "vide that such improvements can be made only in "pursuance of an ordinance; and the language of said "Section 75 is also to some extent misleading, and "probably did mislead the city authorities of Emporia "into doing by resolution what they should have done "by ordinance. This section provides, among other "things, that when the city council has passed a reso- "lution declaring the improvement to be necessary and "given proper notice thereof in the official newspaper "of the city, then, 'if a majority of the resident own- "'ers of the property liable to taxation therefor shall "'not, within 20 days thereafter, file with the clerk "'of said city their protest against such improvement, "'then such council shall have the power to cause such "'improvement to be made and to contract therefor, "'and to levy taxes as herein provided.' The city au- "thorities probably supposed that after they had com- "plied with the provisions of said Section 75 that "'then such council,' without the mayor or any other "officer of the city, 'shall have power to cause such "'improvement to be made, and to contract therefor, "'and to levy taxes,' without observing any further "formalities."

But the court held that while said Section 75 of the organic act of the city of Emporia gave the authority to the council to make the improvements, without specifying in what manner that authority should be exercised, yet that Section 32 gave power to do such things by ordinance, and did not give authority to do them in any other manner, and that, therefore, an ordinance was necessary, and no ordinance having been passed, that the proceedings were void.

Similarly, in the present case, although the act of 1903 does not in express terms require the grant of a franchise to be made by ordinance, yet, by the city charter, all legislative power, and all municipal powers over subjects of municipal control must be exercised by ordinance.

That the grant of a franchise is a legislative act is supported by abundant authority.

"It is essential to the character of a franchise that " it should be a grant from sovereign authority, and " in this country no franchise can be held which is " not derived from a law of the state."

Bank of Augusta v. Earle, 13 *Peters* 519. *p.* 595.

"Franchises are rights and privileges acquired only " by special grant from the public through the legis- "lature."

St. Louis, etc., R. Co. v. Balsley, 18 *Ill. App.* 82.

" * * * * the state has no proprietary interest in " the streets of a city dedicated to public use * * * " When the state grants to a private corporation an " easement over the streets, not common to the public " at large, it acts in its sovereign capacity and grants " a franchise * * * "

San Francisco v. Spring Valley W. W., 48 *Cal.* 493.

"The authority of the city board of trustees" (to grant the right to construct, maintain, and operate a steam railroad in public streets of the city), "under the "statutes referred to, is legislative on its nature; it is "of a piece with the power to enact municipal police "and other ordinances—local laws [*McCracken v. "San Francisco*, 16 *Cal.* 620], and is not referable for "its support to the power of making contracts. (Cit- "ing cases) * * * The streets of the city are "not held as corporate or municipal property, subject "to the powers of contractual disposition. * * * "

South Pasadena v. Terminal Ry. Co., 109 *Cal.* 315.

" * * * the granting of a franchise" (for a street railway) "is not the same thing as a contract "and the exercise of such a power cannot be vindi- "cated or upheld as falling within the same rule as "the power to make contracts."

People's R. R. v. Memphis R. R., 10 *Wall.* 38.

"A franchise is a special right or privilege granted "by the people to an individual * * * The legis- "lative character of the grant is the same whether it "passes to the individual from the people, via the state "legislature, or by way of a municipal board of su- "pervisors having the authority vested in it by the "state legislature to enact the grant. When legislative "power is vested in a municipal board, acts done in "the exercise of that power are acts of legislation, and "should be recognized as such by the courts. It has "been decided by this court that the granting of a "franchise is a legislative act. This has been decided "in a long, unbroken line of cases, beginning with "*Chard v. Harrison*, 7 *Cal.* 113, and ending with "*Quinchard v. Board of Trustees*, 113 *Cal.* 664."

People v. Dean, 122 *Cal.* 421.

Since the charter prescribes the mode in which the legislative power of the city must be exercised, to-wit, by ordinance, that mode is restrictive and exclusive.

In the case of *McCracken v. San Francisco,* 16 *Cal.* 591, the Supreme Court of this state, referring to the section of the charter of San Francisco which provided that the council of that city "should have power " within the city to pass all proper and necessary laws " for the regulation, improvement, and sale of city " property," said:

"When that instrument" (the charter) granted a " power with a specific designation as to the mode in " which it should be used, the mode was restrictive— " no other mode could be followed."

And in its opinion the court quotes, with approval, the language of the Supreme Court of New York in the case of *The Farmers Loan & Trust Company v. Carroll,* 5 *Barb.* 649:

"When a corporation relies upon a grant of power " from the legislature to do an act, it is as much re- " stricted to the mode prescribed by the statute for its " exercise, as to the thing allowed to be done."

"The rule is general, and applies to the corporate " authority of all municipal bodies—when the *mode* " in which their power on any given subject can be ex- " ercised is prescribed by their charter, the mode must " be followed. The mode in such cases constitutes the " measure of the power."

Zottman v. San Francisco, 20 *Cal.* 102.

Counsel for appellant, on the other hand, contend that an ordinance is not essential to the grant of a franchise; that the only action on the part of the council contemplated by the act is a mere order or declaration that the franchise be "struck off, sold and granted " * * * to the highest bidder therefor"; and that insuperable difficulties would arise in the operation of

the scheme contained in the act for the sale of franchises, if grants must be made by ordinance.

They argue that if the purchaser paid his money within one day and filed his bond within five days after the passage of the ordinance by the council, and the mayor took ten days to consider the ordinance, it would be absurd to suppose that he could then veto it after the franchise was paid for and the required bond filed.

But we submit that this supposition is not any more absurd than the contention counsel themselves make, viz., that the franchise is actually and finally sold to the highest bidder at the time of the acceptance of his bid by the council, although he has not paid his money or filed his bond, and may never do so.

According to counsel, everything required by the law to be done by the council in order to vest title to the franchise in the highest bidder is done at the time of the acceptance of his bid, although he has not paid his money or filed his bond, and may never do so.

Counsel profess not to be able to believe that the bidder is required to deposit his money and file his bond while there is a contingency that the grant to him may not be consummated, but they see nothing unreasonable in making a complete grant of a franchise to one who has neither paid the purchase price nor given security for the performance of its conditions. Is the difficulty that the bidder might deposit his money and not get the franchise any more serious than the alternative difficulty that the franchise might be granted and no money or security be received by the city?

If the law contemplates, as counsel contend, that the highest bidder for a franchise has twenty-four hours *after the grant is made* in which to pay the purchase price, and five days *after the grant is made* in which to give his bond, and if we are correct in our contention that the grant may only be made by an ordinance approved by the executive, or passed over his veto, how is it possible for the difficulty suggested by counsel to arise, viz: that the bidder may pay his money and execute his bond, only to have the executive *thereafter* defeat the sale by vetoing the ordinance? At all events, if the bidder has twenty-four hours and five days, *after the grant is made,* in which to pay his money and file his bond, it is immaterial whether the grant has to be made by ordinance or by resolution.

Counsel for appellant have called attention, in their brief [pp. 93 *et seq.*], to the provisions of the constitution of California, subjecting to the control of the general laws of the state, all cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of the constitution, *except in municipal affairs,* and also to the fact that the charter of the city of Los Angeles was framed and adopted under the authority of that constitution, and is, therefore, not subject to, nor controlled by, general laws in municipal affairs.

Counsel contend that the granting of street railway franchises in the city of Los Angeles and the manner in which such grants are to be expressed, are both subject to the control of general laws, because, as counsel assert, neither the granting of such franchises, nor the manner of making such grants, is a "municipal affair"

within the meaning of the constitution. But, under the authorities just cited by us, it is immaterial whether the granting of a street railway franchise in the city of Los Angeles and the manner of expressing such grants are municipal affairs or not, for the reason that, whether the provisions of the charter or of the general laws control, in either case an ordinance or resolution of the city council providing for the grant of such franchises must, *before it takes effect*, be presented to the mayor and be approved by him, or passed over his veto.

If the manner in which the grant of a franchise is to be expressed is a municipal affair, the charter requirements that such an act must be performed by ordinance would be applicable, and, in the case of a conflict between the charter and the general law, would control. On the other hand, if the manner in which the grant of a franchise is to be expressed is not a municipal affair, then the provisions of the general law contained in the Act of March 27th, 1897, requiring an ordinance or resolution granting a franchise to be approved by the mayor or passed over his veto, are applicable.

In this connection, it may be noted that the Supreme Court of California, in the case of *Morton v. Broderick*, 118 Cal. 486, has held that the act of March 27, 1897, did not apply to San Francisco for the reason, as stated in the opinion of the court, "that it unquestionably deals with a municipal affair, "the mode and manner of the passage of ordinances "and resolutions provided for in the charter."

That case was an original proceeding in mandate to compel the auditor to enter taxes upon the assess-

ment roll in conformity with the rates fixed by the board of supervisors. Respondent contended that the levy was illegal because it lacked the signature of the mayor as required by the Act of March 27, 1897, which provided that all ordinances and resolutions passed by the city council, or other legislative body of the municipality, should be presented to the mayor for his approval. In passing upon this point, the court, after adverting to the fact that the mayor's signature is in terms required by the provisions of the Act of 1897, said:

> "* * * But before this act it had been believed by the legislature and by the people that "it would be wiser to relieve charters of cities "from the operation of general laws affecting "municipal affairs, lest otherwise there would be "danger of the charter provisions being entirely "'frittered away'. In accordance with this belief, an amendment to the Constitution was "adopted in 1895 [Stats. 1895, p. 450], providing that 'cities and towns heretofore or here-"'after organized, and all charters thereof framed "'or adopted by authority of this Constitution, "'*except in municipal affairs*, shall be subject "'to and controlled by general laws.' The "amendment is found in the italicized words. The "act of 1897 unquestionably deals with a municipal affair, the mode and manner of the passage of ordinances and resolutions provided for "in the charter. Under this constitutional "amendment, such acts now apply only to cities "and to their charters which have organized "under the general scheme embraced in the "municipal corporation act. [Stats. 1883, p. "93.] San Francisco is not one of such cities, "and the act of 1897 has, therefore, no application to it."

If, as counsel contend, the matter of granting a franchise for a street railway in the city of Los Angeles, is not a "municipal affair," for either of the reasons suggested by counsel, to wit, because it is not a proper subject for municipal control, or because it is not provided for in the charter, then the act of March 27th, 1897, applies. Hence we submit, that whether the act of March 27, 1897, requiring all ordinances or resolutions granting a franchise to be presented to and approved by the mayor, or passed over his veto, is applicable to the city of Los Angeles or not, there can be no escape from the proposition that an ordinance (or resolution adopted and approved in the same manner as an ordinance) was essential to the granting of a franchise to the appellant.

Counsel for appellant argue [brief, p. 119], that "When the charter of the city of Los Angeles said "that in order to grant a franchise an ordinance was "necessary to be approved by the mayor, the natural "construction of it would be that the granting of "franchises here mentioned and referred to was the "grant of such franchises as by the charter the city "was authorized to grant. * * * Now, under "the charter, the city has the power to grant many "different franchises." And counsel proceed to enumerate the kinds of franchises that the city, by express provision of its charter, has the power to grant—street railway franchises not being included in the number. And counsel, therefore, conclude that the manner prescribed by the charter for the execution of grants of franchises, to wit, by ordinances, has no application to street railway franchises. But this argument is effectually disposed of by the decision in the case of

Eisenhuth v. Ackerson, supra, in which the Supreme Court of California held that while the power of the municipality to grant street railway franchises was derived from a general law of the state, to-wit, Section 497 of the Civil Code, yet the provisions of the organic law of the city requiring the grants of all privileges to be made by ordinance, or resolution, approved by the mayor, or passed over his veto, were applicable to grants of street railway franchises. This case is specially significant on this point, in view of the fact that the charter of San Francisco, like our own, contained no express provisions relating to the grant of street railway franchises.

Counsel for appellant lay great stress upon the proposition that no ordinance can be necessary to the grant of a franchise because, as they contend, the language of the act of 1901 excludes the possibility of the construction that the mayor has anything to do with such a grant or that, between the time of advertising the sale and the time of a failure on the part of a successful bidder to file his bond, any discretion is left to the council. And in support of this proposition counsel point out [Brief, p. 76] that after the franchise is advertised for sale the act declares that it *shall* be struck off, sold and granted to the highest bidder. But we submit that this apparently mandatory language does not mean that, a franchise once having been offered for sale, the legislative body has no discretion but to grant it to the highest bidder, regardless of the amount of his bid or of the contingency that public interest may require a modification of the terms of the fran-

chise advertised,—or even an abandonment of the proposed sale and grant.

It is a common provision of the law relating to municipal contracts that, after advertisement inviting proposals, they *shall* be awarded to the lowest bidder. Yet, according to the authorities, this does not mean that the council has not discretion to refuse to award the contract to the lowest bidder and to reject all bids.

In the case of *Walsh v. Mayor etc., of New York*, 113 *N. Y.* 142, the Court of Appeals of New York was called upon to construe a statute relative to contracts by the mayor, aldermen and commonalty of the city of New York, and, speaking by Peckham, J., said:

"It is true that the language of that act is quite per-
" emptory, and provides that all contracts 'shall be
" 'awarded to the lowest bidder for the same, with
" 'adequate security, and every such contract shall be
" 'deemed confirmed in and to such lowest bidder at
" 'the time of the opening of the bids, estimates or pro-
" 'posals therefor, and such contract shall be forthwith
" 'duly executed * * * with such lowest bidder.'
" Under such law it is quite clear that no contract
" could be let to any person other than to the lowest
" bidder with adequate security. The obvious purpose
" was to secure to the city the advantages of having
" its work done by the lowest bidder therefor after
" proper advertisement. I do not think that it meant
" to compel the making of a contract even with such
" lowest bidder, if it were plain that the bids were all
" largely in excess of the real cost of the work. * * *
" The existence of such a power might frequently be
" necessary to protect the city against fraudulent com-
" binations, evidenced, perhaps, by informal bids for
" low prices, and if such power did not exist, ending in
" the award of a contract to the lowest bidder whose
" bid was formal, but at a price enormously in excess
" of the real cost of the work. It was never intended,
" as we think, to render it absolutely necessary in such

" a case that an award of the contract should be made " to such a bidder. It was meant that no contract " should be awarded to any but the lowest bidder, and " whether to him or not, would be a question for the " body awarding the contract, acting in good faith, " and for what they deemed the true interests of the " city.

" If otherwise, if there were but one bid, and that " vastly in advance of a fair price and decent profit, " nevertheless, the city would be bound to have such " a contract saddled upon it. It would require the " plainest commands from the legislature before we " should be able to bring ourselves to think for a mo- " ment that any such result was intended. We do not " think that the act cited contains such language, or " that it was ever intended to accomplish any such " end."

Applying this principle to the present case, we submit that the fact that the law requires that franchises shall be sold and granted to the highest bidder, does not militate against the position we have taken, since it is not at all inconsistent with this requirement that the governing body of a municipality at any stage of the proceedings for the sale of a franchise, before the grant is actually made by ordinance, should have the right to reject all bids for the franchise. The law prescribes the mode and conditions of granting franchises, but leaves the governing body to determine in the exercise of its legislative discretion whether or not the grant shall be made. This is particularly true of those provisions of the act of 1901 under which this case has arisen.

The plain purpose of the act is, not to compel the grant of a franchise, but to limit the power of the municipality in the making of such grants, so that if the

grant is made, a price—and that the best obtainable—should be secured therefor. There is no intention disclosed in the act to render it absolutely necessary to confer the privileges advertised for sale upon anyone, simply because his was the highest bid. It was meant that no franchise should be awarded to anyone but the highest bidder, and whether to him or not would be a question for the legislative body granting the franchise, acting in good faith, and for what they deemed the true interests of the city, to decide. And in the case of the city of Los Angeles, such body is, as we have shown, the mayor and city council.

In view of the fact that the city holds its streets in trust for the people, and in acting upon an application for a franchise therein, is presumed to be guided by considerations of the public interest and welfare, public policy requires that, in a controversy between the city and an individual as to the construction of a statute relating to the grant of such a franchise, all doubts should be resolved in favor of the city. It is a familiar rule of construction:

" * * that where a statute operates as a grant " of public property to an individual, or the relinquish- " ment of a public interest, and there is a doubt as to " the meaning of its terms, or as to its general purpose, " that construction should be adopted which will sup- " port the claim of the government rather than that of " the individual. Nothing can be inferred against the " state."

Slidell v. Grandjean, 111 *U. S.* 412.

"It is * * imperative upon the court to jealously "guard against every unauthorized diminution of the "rights of the public."

Citizens Coach Co. v. Camden Horse R. R. Co., 29 *N. J. Eq.* 299.

The legislature, in providing for the sale of franchises in the streets of municipalities, recognized that these privileges have become immensely valuable, particularly in the large cities, and the evident purpose of the law is to enable the city authorities to obtain for such franchises sums commensurate with their value. But this purpose can only be accomplished by construing the law so as to give the governing body of a municipality, where it is proposed to grant a franchise, the right to refuse all bids therefor, when, in its judgment, the highest offer is inadequate. Otherwise, such governing body would be a mere puppet, having no discretion or authority in conducting a sale except to grant the franchise to the highest bidder, without regard to the amount of the bid or the value of the franchise, or other considerations of public interest.

Counsel cite the case of Jacobs v. Board of Supervisors, 100 Cal. 121, in support of the proposition that the grant of the franchise claimed by the appellant did not require any action by the mayor to make it effectual, but an examination of that case will show that it is not an authority upon the question under consideration.

Section 1, of Art. XIV of the constitution of California, declares that the rates for the use of water supplied to any city and county shall be fixed annually "by the board of supervisors, * * * or

"other governing body of such city and county, by "ordinance or otherwise, in the manner that other "ordinances or legislative acts or resolutions are "passed by such body."

The question arose in the Jacobs case whether the mayor of San Francisco had the legal right to veto an ordinance of the board of supervisors fixing the water rates, and also whether a court could by mandamus compel the board of supervisors to refix water rates, unless they either yield to the views of the mayor, or are able to pass the ordinance over his veto, and the court decided in the negative upon both these points.

In the opinions in the case it is pointed out that, under the express provisions of the charter of San Francisco, the board of supervisors is the legislative body as to all subjects of legislation with a few special exceptions, and its acts do not *generally* require the approval of the mayor; that "the supervisors act "judicially when fixing the water rates and decide "upon the evidence presented, according to their hon- "est convictions and best judgment"; that to hold that the mayor has the legal right to veto a water rate ordinance would "involve a palpable absurdity, "or an attempt to accomplish an absolute impossibility " * * * and failure to consummate the "purpose of the constitutional provision under re- "view;" that "fixing water rates is an entirely different "thing from passing or refusing to pass a proposed "order or ordinance, which merely involves ordinary "considerations of public policy, and is not an abso- "lute necessity"; that the power to fix water rates

comes from the constitution and was "expressly "granted to the board of supervisors; and in the "grant no mention is made of the mayor."

The concurring opinions of four of the seven justices were based upon the fact that, under the provisions of the organic law of San Francisco, the approval of the mayor "is required to only certain "classes of ordinances", which are specifically enumerated, and "that an ordinance fixing water rates is not "included in either of these classes".

The foregoing extracts from the opinions in the Jacobs case are sufficient to show that it has no bearing upon the questions in this case. Here the action of the governing body was legislative in character, and did involve "considerations of public policy", and was not "an absolute necessity". In the Jacobs case, the power to be exercised was expressly granted to "the board of supervisors"; here it is expressly vested in the "legislative or governing body" of the municipality, which, under the charter, is the mayor and council, and which, under the charter and the statutes of the state, by express provision [act of March 27, 1897], and by necessary implication, [Eisenhuth v. Ackerson, *supra*] is required to act by ordinance, adopted by the council and approved by the mayor, or passed over his veto.

For the same reasons the case of Truman v. Board of Supervisors, 110 Cal., 128, cited by counsel, is also without applicability to the question under consideration. The board of supervisors of the city and county of San Francisco fixed the tax rate under the statutes of the state which expressly provided that

"the board of supervisors of each county must * * * * fix the rate of county taxes, etc.," [Political Code title 9, part 3] and the court held, in the Truman case, that a writ of mandate would not lie to compel the board to act a second time in fixing the rate of taxation, in subordination to the veto of the mayor, "because, under the present statutory law, the board of supervisors of the city and county of San Francisco have the power to fix the rate of taxation and the mayor has no veto of their action in the matter". The power to fix the tax rate is by the express language of the statute conferred upon the board of supervisors alone, while the power to grant franchises is expressly conferred upon the "legislative or governing body"—which, in the city of Los Angeles, includes the mayor as well as the council.

Counsel also contend [brief p. 135] that, even if a formal ordinance approved by the mayor was necessary to perfect the legal title of appellant to the franchise, the appellant has done all the statute required of it, and if anything was necessary to complete the legal title, still the equitable title was vested in the appellant, and could no more be divested or impaired than the complete legal title could be. This contention, however, ignores the fact that under the laws of California [Act of 1901; Act of March 27, 1897; and Section 497 of the Civil Code], the power to grant street railway franchises in the city of Los Angeles is vested in the "legislative body" of the city, to wit, the mayor and council, and, therefore, it was not competent for one branch of that body, namely the council, by any independent action, to grant any title

to the franchise, whether legal or equitable, or in any manner to bind the executive so as to deprive him of the power to exercise his discretionary veto. In other words, action by the mayor and council expressed in the form of an ordinance adopted by the council and approved by the mayor, or passed over his veto, must precede the grant of the franchise and there can be no such thing as an equitable right or inchoate title to a sovereign grant of a franchise.

Futhermore, the argument of counsel that when the highest bidder for a franchise has done all that the statute requires of him and nothing remains to be done except the making of the grant by the legislative body, the equitable title to the franchise is vested in him, fails to distinguish between the character of the act of making a legislative grant, and the character of the act of making a grant of property, although, as counsel themselves recognize, "a franchise is not the "property of the state in any proper sense of that "term, it is a sovereign power and prerogative" [brief p. 129]. The authorities do hold that a property right springs out of a grant of a franchise by the state, but none of them treat the act of making such a grant as anything but legislative or governmental in character.

The grant of a franchise—the act of granting it—is not a contract, and we think has never been held to be such. It is the relation between the grantee and the state, which results from the acceptance of the grant as the basis of action after it is made which is treated as a contract.

" * * * the granting of a franchise is not the "same thing as a contract, and the exercise of such

"a power cannot be upheld or vindicated as falling "within the same rule as the power to make con- "tracts."

Peoples' Railroad v. Memphis Railroad, 10 Wall. 38, 51.

There is, as was pointed out by Justice Brown in the case of *Walla Walla v. Walla Walla Water Co., 172 U. S. 1*, "a substantial distinction between the "acts of a municipality as the agent of the state * " * * and its acts as the agent of its citizens." Acting in the former capacity, it exercises powers which are public, governmental, or sovereign in character; in the latter capacity it exercises powers of a quasi-private, proprietary, or business nature. The contract making power of a municipal corporation necessarily extends only to those matters in which it has a proprietary or quasi-private interest where it acts for the private advantage of its inhabitants, or of itself as a legal personality. But "the streets of a "city are not held as corporate or municipal property "subject to the power of contractual disposition, like "the property of an individual."

South Pasadena v. Terminal Ry. Co., 109 Cal. 315, 322;

San Francisco v. Spring Valley Water Works, 48 Cal. 529;

In re Philadelphia, etc., Ry. Co., 6 Wheat. 44.

"It assists to an understanding of the extent of "legislative power over municipal corporations prop- "er (incorporated towns and cities) to observe that "these, as ordinarily constituted, possess a double

"character; the one governmental, legislative or "public; the other, in a sense, proprietary or private."

Dillon's "Municipal Corporations," 4th ed., sec. 66.

There cannot be any doubt in which of these two characters a municipal corporation acts when granting a franchise.

In conclusion, we submit for the reasons and upon the authorities above set forth,

That the Court has no jurisdiction of this cause, because no diversity of citizenship exists, and because the bill does not state a case within the protection of the impairment clause of the Constitution, or within the protection of the Fourteenth Amendment thereto.

That there is no equity in the bill, because the appellant did not acquire the franchise it claims, nor has it any valid contract with the city in relation thereto.

Respectfully submitted,

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Attorneys for Appellees.

16502

Supreme Court of the United States.

No. 175.—October Term, 1903.

Pacific Electric Railway Company, Appellant, vs. The City of Los Angeles, P. W. Powers, W. H. Pierce, et al., &c.	Appeal from the Circuit Court of the United States for the Southern District of California.

[April 11, 1904.]

This is an appeal directly from the Circuit Court. The appellant asserts rights under the Constitution of the United States, in that a contract alleged to exist between it and the council of the city of Los Angeles, granting appellant a franchise under the statute hereinafter mentioned, was impaired by the action of the council. Also that the property of appellant was taken without due process of law.

By an act of the legislature of the State of California, passed March 11, 1901, (Statutes of California, Extra Session Thirty-third Legislature, 1900, p. 265,) it is provided that every franchise or privilege to operate street railroads upon the public streets or highways, shall not be granted by the respective governing bodies of any city and county, city or town, except upon certain conditions, to wit, the applicant for the franchise must file with "the governing or legislative body" any application, and thereupon said body may, in its discretion, if the application be accompanied by a petition signed by the owners of three-fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, advertise the fact of the application and that it (the governing body) proposes to grant the same. The advertisement must be in some newspaper published in the municipality wherein the franchise is to be exercised, and must state that bids will be received for such franchise, and that it will be awarded to the highest bidder. The advertisement must state a number of other matters, but as no point is made upon them they are omitted.

In pursuance of the statute appellant made application to the council of the city of Los Angeles for an electric street railroad franchise. The application was referred to the board of public works, which board recommended the franchise be offered for sale. The report was adopted by the council and the franchise was offered for sale, and notice thereof was given as required by the statute. The notice given was very full and circumstantial, but its contents are immaterial to the views we take of the case.

Bids were received by the council on the 10th of February, 1902. Appellant bid $25,000; W. S. Hook, who, it is alleged, was president of the

Los Angeles Traction Company, bid $37,500; E. A. Davis, one of the appellees, bid $139,000, and E. Murray bid $415,000. There were no other bids.

Section 5 of the act of 1901 provides that at the time of opening of the bids any responsible firm or corporation present or represented may bid for the franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid so made may be raised ten per cent by any responsible bidder present, and said franchise or privilege finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, who shall deposit with the "governing body," or such person as it shall direct, the amount bid within twenty-four hours thereafter. In case of failure to do so "then the said franchise or privilege shall be granted *to the next highest bidder* therefor."

No person raising the bid of E. Murray, in accordance with section five, his bid was accepted, and it was ordered that said franchise be struck off and sold to said Murray, and the city treasurer was ordered and directed to receive the money therefor. It was further ordered that the period of twenty-four hours within which he was allowed to pay for the franchise should expire at 3.15 P. M. on February 11, 1902.

The bids of Hook, Davis and Murray were all made on behalf of the Los Angeles Traction Company and for its benefit, and with the fraudulent intent of preventing competition and further bidding when the bids should be open, well knowing that the franchise was not worth the sum of $415,000, and that no advance on the same was to be made. And it is alleged that Murray has no financial standing, never intended to pay his bid, and did not pay the same or offer to pay the same within the time allowed, and never appeared again before the council.

On the 11th of February the traction company and Davis and Hook appeared before the council, and in pursuance of their fraudulent scheme claimed that the council had no authority or power to do any other thing than to accept the bid of Davis for $139,000, and demanded that the said franchise be awarded to him. Such proceedings were had that the council declared the bid of Murray to be fraudulent and void, and the matter of the sale of the franchise was again taken up. Appellant thereupon bid the sum of $152,000, and presented with its bid a certificate of deposit on one of the banks in the city, drawn in the name of the city for said sum. Bids over and above said bid were called for by the council, but none was received, and the franchise was ordered to be sold and struck off to appellant. The treasurer was also directed to receive the purchase money, which was paid by appellant in United States gold coin, and it was accepted by the treasurer and the council. Appellant executed a bond in the sum of $25,000 as required by the statute, and the franchise was thereupon struck off, sold

and granted to appellant. Subsequently the council passed an ordinance granting the said franchise to appellant, and presented the same to the mayor of the city, who returned the same to the council without his signature or approval, and with his objections to the same. On the 21st of February the question came up before the council for the passage of the ordinance, notwithstanding the veto of the mayor. The ordinance was not passed, but the council passed a resolution pretending and purporting to order any and all bids to be rejected, and ordered the treasurer of the city to refund to appellant the money paid and the clerk to return the bond executed and filed by appellant—all of which was done by the council under the pretense that the approval of the mayor to the ordinance passed, as above stated, was necessary to give it validity or to make effectual the grant made by the city of the franchise to appellant.

It is alleged that the council of the city, under the statute of the State, had no discretion as to the bid of appellant, but were, on the contrary, by the operation of said statute, ordered to strike off, sell and grant the franchise to appellant and no ordinance was necessary to perfect the grant, and the mayor was not authorized to perform any function in, about or concerning said franchise, and his veto was wholly unfounded; and the title of the appellant became fully vested under the statute, and there was no power in the mayor or the council, or in both, to in any manner affect the rights which had accrued to appellant by virtue of its franchise.

That appellant had become vested with the title to the franchise, and the orders and resolution of the council, pretending to reconsider the order granting the franchise as above stated and readvertising the application, were made without any authority, and were intended to deprive appellant of its said property without due process of law, in violation of the provision of the Constitution of the United States prohibiting any State from depriving any person of life, liberty or property without due process of law.

That under the statute, notice of sale and order granting the franchise appellant was required to commence work for the construction of the road within four months from the 11th of February, 1902, and complete the same within three years from that date. That appellant was and is desirous of commencing such construction, but on the 26th of February, 1902, the council passed an order instructing the mayor, the street superintendent and the chief of police to stop and prevent any attempt appellant might make to construct said road upon any of the streets with all the force at their command, and said officers, acting under such instructions, will undertake by violence to prevent appellant from constructing said road or exercising any rights under its franchise, or for any enjoyment of its property so acquired unless prevented by the court (Circuit Court.)

That if the city should sell said franchise, rights and privileges again it will aid the purchaser, with the police force of the city, to take posses-

sion of the city property, rights and franchises, and construct a road over and along said route, and to oust and exclude appellant therefrom, and appellant will be compelled to resort to a multiplicity of suits to protect and defend its rights, privileges and franchise purchased by it, and its right to exercise and enjoy the same, and appellant will suffer great and irreparable damage, which cannot be compensated in money.

The relief prayed is that appellant be declared the owner in fee simple of the rights and franchise described; that the orders of the council, reconsidering the order selling and granting the same, and all of the proceedings of the council subsequent thereto, be rescinded and vacated, and the appellees be restrained from preventing appellant from constructing the road and exercising the rights, privileges and franchise granted.

The city of Los Angeles and the appellees composing its council demurred to the bill. The other appellees also demurred, and the grounds of demurrer, were among others, that the court had no jurisdiction of the subject matter of the suit and the bill was without equity. The Circuit Court overruled the demurrers on the first ground and sustained them on the second. (118 Fed. Rep. 747.)

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

The jurisdictional question first demands consideration. It will be observed that rights under the Fourteenth Amendment of the Constitution of the United States were explicitly asserted. Besides, the Circuit Court treated the bill also as presenting for consideration rights under the contract clause of the Constitution and entertained jurisdiction of the case on the authority of *Riverside & A. Ry. Co.* v. *City of Riverside*, (118 Fed. Rep. 736.)

In *City Railway Co.* v. *Citizens' Railroad Co.*, (166 U. S. 557,) the railroad company occupied certain streets of the city of Indianapolis under ordinances of the city. Subsequently the city, in pursuance of an act of the General Assembly of the State, gave the City Railway permission to lay its track on some of the same streets which were occupied by the railroad company. The latter brought suit in the Circuit Court of the United States for the District of Indiana against the railway company, to enjoin it from availing itself of the privilege attempted to be granted. The court granted the relief prayed for and the case was brought here directly. A question of the jurisdiction of the Circuit Court was raised, and replying to it we said: "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." And it was further observed whether the contract was or was not impaired could not

be passed upon "on the motion to dismiss so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one." This view was repeated in *Illinois Central Railroad Co.* v. *Adams*, (180 U. S. 28.)

In those cases the question of jurisdiction was presented on motion to dismiss. In the case at bar it is presented by demurrer, but, however presented, jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. (*City Railway Co.* v. *Citizens' R'd Co., supra.*) Nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient—a substantial controversy must be presented. This requirement is satisfied in the case at bar. The Circuit Court, therefore, had jurisdiction, and the case was properly brought here from that court, since it involves the construction and application of the Constitution of the United States.

2d. The claim of appellant is that the order of the city council of the 11th of February, 1902, granting the franchise to it, appellant, constituted a contract, the obligation of which the subsequent orders of the council impaired, and, further, deprived appellant of its property without due process of law. The question upon which the claim depends is, in our view, a simple one. We need not quote the provision of the statute applicable to the contentions of the appellees, that the notice given of the sale of the franchise was insufficient, nor need we discuss that contention or the contention that the approval of the mayor of the city under the charter of the city and the constitution of the State was necessary to a grant of franchises. We will assume the contentions are untenable, and we will also assume that all the steps preliminary to the bidding were rightfully taken and that the order of the council striking off and selling to appellant the franchise was sufficient to vest title in appellant if its bid was properly and legally accepted under section 5 of the act of 1891. This narrows the question in the case to the construction of that section.

The notice of an application for a franchise is required to state that sealed bids will be received for the franchise "up to a certain hour and day named therein," (sec. 3,) and also to state that the franchise "will be granted to the person, firm or corporation who shall make the highest cash bid therefor;" and any bid may be raised not less than ten per cent "above the highest sealed bid," and the franchise finally struck off, sold and granted to the "highest bidder." (Sec. 5.) Section 5 also provides that the "successful bidder shall deposit with said governing body, or such person as it may direct, the full amount of his or its bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the *next highest* bidder therefor." We italicize the pivotal words. To what do they refer? To bids already made as contended by

appellees or to a bid or bids to be made as contended by appellant? More obviously the former. They express the relation between bids in existence—those already made and pending before the council in pursuance of its notice. It is only in comparison with the *next* highest of those that the words have signification.

But this construction, it is said, permits the fraud which the bill alleges was practised upon the city council. We cannot say the argument is without force, but that fraud might be attempted may have been considered and weighed by the legislature. It may have been thought that in any plan of competition which could be devised there would be danger of illegal combinations, and that the safeguard against them must be the vigilance of the municipal officers, and, may be, that of competing interests. But be this as it may, the defects of the statute cannot control its plain letter. Obviously to give them such effect would be to amend the statute, not to interpret it. And we think section 5 is plain, and was intended to express as an alternative of a bid not fulfilled the acceptance of one already made, not one to be made. We are fortified in this view by section 7 of the act. That section provides that the grantee of the franchise shall file a bond to fulfil the terms and conditions of such franchise, and also provides that if such bond be not filed "the award of such franchise shall be set aside and the same may be granted to the next lowest bidder, or again offered for sale," in the discretion of the governing body. In other words, when there is to be further competition it is explicitly provided for.

It follows that appellant's bid was not the next highest to that of Murray and the order of the council selling and granting appellant the franchise was void, and the decree of the Circuit Court dismissing the bill is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

16505